Supreme Court, U.S.
FILED
031534 MAY 8 - 2004

No. 03-

IN THE

Supreme Court of the United States

PHOEBE RUIZ-VALERA,

Petitioner,

vs.

ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an inference of non-discrimination is proper under Title VII based on the fact that the decision makers who themselves are members of a protected class make adverse employment decisions against employees who belong to the same protected class as that of the decision makers.

2. Whether in view of the conflicts in the circuits in interpreting case law as to what constitutes "materially adverse changes" in working conditions, there is need for an objective definitive standard on this issue to screen such claims for materiality.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Phoebe Ruiz-Valera, respectfully prays that this Writ Of Certiorari issue.

OPINIONS BELOW

The unreported Summary Order of the Second Circuit Court of Appeals affirming the District Court Order for summary judgment is at Appendix ("App.")1a-5a. The Order of the District Court adopting the recommendation of the magistrate Judge to grant summary judgment to respondent is at App. 6a-13a. The Report and Recommendation to grant summary judgment by the magistrate judge which was adopted by the District Court and affirmed by the Second Circuit Court Of Appeals is at App. 14a-51a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq*. ("Title VII") is set forth below:

§ 2000e-2 Unlawful Employment Practices

(a) Employer practices

It shall be an unlawful employment practice

for an employer-

(1) ... to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify ...employees ...in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect... status as an employee, because of such individual's race, color, religion, sex , or national origin.

STATEMENT OF THE CASE

The facts involve female gender discrimination *via* female decision makers.

Petitioner Phoebe Ruiz-Valera, a Hispanic female, was hired at age 32 in September 1982 by respondent Association of The Bar of The City of New York ("NYC Bar"). On February 4, 1999 at age 49 and after 17 years with the NYC Bar, Ruiz-Valera was terminated. For the last 14 years with the NYC Bar, she was Head of the Technical Information Services. Ruiz-Valera holds a Masters in Library Science and a Master of Arts in Linguistics. At the time of her termination, Ruiz-Valera had a total of 26 years of library experience including 24 years in law libraries.

Two years previously in early 1997, the NYC Bar had begun a search for a new Library Director. A J.D. was not a mandatory requirement. In 1997, relying on her degrees, 22 years of law library experience of which 15 years was spent at the NYC Bar's library, Ruiz-Valera applied for the Director's position. Meanwhile, Richard Tuske, Head of Library

Operations who was in charge of building operations, the furniture, mail room, wiring, etc., was appointed Acting Director. Tuske possessed only a high school diploma.

Inter alia, Ruiz-Valera complained about Tuske's appointment as Acting Director. At least, she was more qualified for Acting Director than Tuske. Fern Schair, Executive Secretary and Chief Administrative Officer of the NYC Bar swore in an affidavit that Ruiz-Valera's complaint against Tuske was one of reasons Ruiz-Valera was not considered for the Director's position because "she...cast doubt on the qualifications of one of her [male] colleagues, Richard Tuske..." In June 1997, Elizabeth Klampert was hired as Director.

Upon becoming Director, Klampert admits she excluded, in essence, "segregated" Ruiz-Valera from important meetings with vendors and others. These meetings that Ruiz-Valera had always attended were crucial in the performance of her duties in Technical Services. All other department male heads similarly situated to her and even support staff attended these meetings. Director Klampert advised Ruiz-Valera that she would send her memoranda only "as appropriate" as to what transpired at the meetings. Ruiz-Valera felt ostracized and fearful for her job.

Then, Klampert took away Ruiz-Valera's essential role in making important managerial library decisions for her department. It was made clear that Ruiz-Valera was not to make decisions even as to personnel, procedures or workflow in her department of Technical Services. Klampert arranged for weekly one-to one [previously unheard of] meetings with Ruiz-Valera where Klampert harassed Ruiz-Valera and actually told her to leave when Ruiz-Valera complained.

Furthermore, Klampert directed Ruiz-Valera to train the male heads in her areas of expertise. For example, Ruiz-Valera trained Department Heads Richard Tuske and Michael Leventhal in her essential duty of bibliographic control. Yet, the male heads were not directed to train Ruiz-Valera in return in their areas of expertise.

There is no dispute that Klampert systematically transferred Ruiz-Valera's duties to other male supervisors. Klampert admitted she directed Ronald Mirvis, Head of Reference Services, to get involved in the cancellation [of materials] process, an essential function of Ruiz-Valera. She admitted she assigned Leventhal, Head of Technology, responsibilities that were Ruiz-Valera's functions. Klampert admits she asked Tuske to get involved in Ruiz-Valera's Technical Services Department.

Klampert abruptly terminated a member of Ruiz-Valera's staff and assigned the terminated employee's duties directly to herself, [Klampert], thus, further reducing Ruiz- Valera's responsibilities. Even a clerical employee who later opened mail in Ruiz-Valera's office was not placed under Ruiz - Valera's supervision. Ruiz-Valera complained about the diminution of her essential duties and responsibilities which she viewed as a demotion. She was left with menial tasks.

In addition to these actions that adversely impacted her, Ruiz-Valera learned in discovery that Klampert praised the males to the hilt to justify higher percentage raises to all the male heads. Klampert without any formal evaluation rated Ruiz-Valera as "mediocre" without citing any deficiencies.

Through discovery, Ruiz-Valera confirmed the extent of the raises of the similarly situated males heads. Leventhal who had been with the library just two years received 4.4% and 7%

raises in two years to Ruiz -Valera's two 3% raises despite her 15 years of good service and the fact she had trained these men. Mirvis with 9 years of service received 16.5% and 8% raises and Tuske with 29 years of service received 9% and 11% raises in two years to Ruiz-Valera's 3%. Ruiz-Valera was also paid the least salary, even less that Leventhal who had been with the NYC Bar for only two years to her 15 years. During an alleged reorganization, all the male heads stayed on except for Ruiz-Valera. She was terminated.

On the discrimination issue, the magistrate Judge held, *inter alia*, "[t]he fact that all raises were recommended and approved by women is evidence that the raises were not a product of gender-based discrimination... the fact that the decision makers were all female ... " App. 40a-41a. This holding was challenged by Ruiz-Valera but summarily adopted by the Second Circuit Court of Appeals and the District Court.

Regarding the "constructive demotion," the magistrate Judge discounted, *inter alia*, Ruiz-Valera's proof of exclusion from important meetings, loss of essential duties and managerial responsibilities to the male heads. The Judge characterized "the reorganization of duties and lines of reporting cited by plaintiff' as 'nothing more than a garden-variety modification of job functions which occurs in any job." App. 45a. The Second Circuit affirmed that Ruiz-Valera did not suffer a "materially adverse change on the terms and conditions of [her] employment." App. 4a.

REASONS FOR GRANTING CERTIFICATION

This writ of certiorari should be granted because:

(1) in discrimination cases, there is a definite conflict with the holding of this Court and among the Circuits as to the evidentiary impact when decision makers in a protected class make adverse employment decisions against employees in the same protected class. Title VII does not imply that the decision makers must not be in the same protected class as the impacted employees for a discrimination claim to survive.

(2) a conflict exists among and within the circuits as to what constitutes a "materially adverse change" in working conditions to constitute an adverse employment action in violation of Title VII. This Court's direction is needed to fashion a definitive rule to resolve this issue. Employers many times "constructively" demote employees as a means of discrimination or in retaliation for their complaining about discrimination.

I. The Decision Below Conflicts With Decisions Of This Court and Of Other Circuits Regarding Decision Makers In A Protected Class Who Make Adverse Employment Decisions Against Employees In The Same Protected Class.

In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75,79(1998), this Court quoting *Castaneda v. Partida*, 430 U.S. 482,499 (1977) reiterated that " [b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." This Court in Oncale continued " [i]f our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of sex'

merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." Nevertheless, as shown in this case, the circuits continue to give conflicting decisions on how to handle this critical issue of same protected classes between the decision maker and the adversely impacted employee in discrimination cases.

Thus, despite precedent on this issue, both the Second Circuit Court of Appeals and the District Court overlooked *Oncale* and did not question the magistrate Judge's reliance of the Eleventh Circuit's *Elrod v. Sears Roebuck & Co.*, 939 F.2d 1466,1471 (11th Cir.1991), an age discrimination case (where the decision makers were older than the employee they fired). In the case at bar, the magistrate Judge ruled that "[t]he fact that all the raises [for male heads] were recommended and approved by women, is evidence that the raises were not the product of gender-based discrimination" in the case here. App.40a. The magistrate Judge repeated this position and stressed , *inter alia*, "the fact the decision makers were all female" again. App.41a. The magistrate Judge placed great weight on this same-sex factor and was overly influenced by this fact at the summary judgment stage. The magistrate Judge did cite *Oncale* but only with respect to what constitutes sexual harassment. App. 27a. The magistrate Judge overlooked this Court's important ruling in *Oncale* on same-sex discrimination.

In contrast, in *Johnson v. Zema Systems Corporation*, 170 F.3d 734,746 (7th Cir. 1999), the Seventh Circuit Court of Appeals reversed the district court's decision on a racial discrimination claim. The magistrate Judge had relied on the Fifth Circuit's opinion in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 657 (1996). The court ruled "[t]he fact that the actor involved in both employment decisions is also a member of the protected class only enhanced the inference" that racial

discrimination did not motivate the decision to discharge. The Seventh Circuit Court of Appeals disagreed:

> We doubt even the more limited proposition that a member of a certain race might be less inclined to discriminate against a member of his own race...Whether a plaintiff can survive summary judgment on a discrimination claim depends on the evidence a plaintiff is able to present. We therefore doubt the utility of broad generalizations about who is and is not likely to discriminate in deciding whether a plaintiff has produced sufficient evidence of discrimination to sustain his burden on summary judgment." *Johnson*, 270 F.3d at 746.

In *Kadas v.MCI Systemhouse Corporation*, 255 F.3d 359,361(7th Cir. 2001), the Seventh Circuit emphatically discounted the dicta in several cases including *Brown* that suggested that the fact that a decision maker is older than the terminated employee should weigh heavily against a finding of age discrimination. The Seventh Circuit offered a "counterdictum" and ruled that the ages of the terminating and terminated employee are unimportant in age discrimination cases. Thus, it should not matter that the decision maker and the impacted employee are in the same protected class.

In *Wexler v. White's Fine Furniture , Inc.*, 317 F.3d 564, 574 (6th Cir. 2003), the Sixth Circuit Court of Appeals

a protected group is unlikely to discriminate against another member of the same group. The Wexler Court found that the "district court erred when it invoked the "same-group inference" at the summary judgment stage."

Moreover, it is not unreasonable to suspect that management would assign the execution of adverse employment actions to those in protected classes to hide the discriminatory intent. In any event, the jury would learn at trial the gender or races of the decision makers and the employee affected and make their own conclusions without assistance.

As indicated, the Second Circuit in this case did not cite *Oncale* on this issue and did not attempt to compare or distinguish it from the case before it. It accepted the magistrate Judge's reliance on *Elrod.* Truly, this Court's direction is needed to put to rest once and for all if "same-group inferences" are compatible with the purpose and spirit of Title VII. We think not.

II. A Conflict Exists Among and Within The Circuits As To What Constitutes A "Materially Adverse Change" In Working Conditions To Constitute An Adverse Employment Action In Violation of Title VII.

In the Summary Order, the Second Circuit Court of Appeals based its decision on *Galabya v. New York City Bd. Of Education*, 202 F.3d 636, 640 (2d Cir.2000) to uphold the dismissal of Ruiz-Valera's claim of a "constructive demotion" which paved the way for her termination. But, *Galabya* also cited *Crady v. Liberty Nat'l Bank And Trust Co*, 993 F.2d 132, 136 (7th Cir. 1999) which ruled that "[a] materially adverse

change might be indicated by a termination of employment, a demotion evidenced by ...significantly diminished material responsibilities, or other indices...unique to a particular situation."

There is no dispute, *inter alia*, that:(1) Ruiz-Valera's was directed to train the other male heads in the library in her areas of expertise and that she did not receive reciprocal training; (2) the male heads took over essential library duties from Ruiz-Valera; (3) Ruiz-Valera's essential managerial responsibilities were siphoned off;(4)Ruiz-Valera received the lowest percentage salary increase, even less than a recently hired male head and (5) Ruiz-Valera was ostracized and "segregated" and deliberately denied attendance to meetings which directly impacted on her position as Head of Technical Services. Ruiz-Valera was advised she would receive "appropriate memoranda" as to what transpired at the meetings.

Ruiz-Valera with two master's degrees and over twenty years experience in law libraries was assigned duties not requiring her skill levels and, in essence, demoted to a clerk. She experienced "a dramatic shift in [the] skill level required to perform job responsibilities" which some courts view as an adverse employment action. *Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994).

In *Meyers v. Nebraska Health and Human Services, et al.*, 324 F.3d 655,660 (8th Cir. 2003), the Eighth Circuit Court of Appeals reversed the district court to allow the jury to decide whether there were material changes in a reassignment which required less education, experience and training than the previous position held by the employee despite the fact the benefits and salary did not change. *In Preda v. Nissho Iwai*

American Corporation,128 F.3d 789,790 (2d Cir. 1997), a different Second Circuit panel than in *Ruiz-Valera* reversed the district court and ruled that Preda had raised a material fact as to whether he suffered an adverse employment action when he was excluded from all departmental meetings and client outings and his duties and responsibilities were downgraded largely to clerical tasks as in *Ruiz-Valera*.

This Court's direction is needed to fashion a standard which could objectively delineate which material changes of working conditions rise up to adverse employment actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A - SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED FEBRUARY 9, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of Feb., two thousand and four.

Present: JON O. NEWMAN,
AMALYA L. KEARSE,
ROSEMARY S. POOLER,

Circuit Judges.

PHOEBE RUIZ-VALERA,

Plaintiff-Appellant,

-v- (02-9359)

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Defendant-Appellee.

Appearing for Appellant: Tina Velantzas-Austin, New Brunswick, NJ.
Appearing for Appellee: Howard Z. Robbins, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Wood, J.).

A TRUE COPY
Roseann B. MacKechnie, CLERK

by_____
DEPUTY CLERK

ISSUED AS MANDATE: 3/9/04

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

Phoebe Ruiz-Valera asserts that the defendant, her former employer, subjected her to race and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. and to age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. She appeals from the order of the district court dated September 24, 2002, accepting the report and recommendation dated February 27, 2002 (Pitman, M.J.), which recommended that the defendant be granted summary judgment on all of its claims. We assume familiarity with the underlying facts, procedural history, and specification of appellate issues and hold as follows.

We review the district court's grant of a summary judgment pursuant to a de novo standard. See Boule v. Hutton, 328 F.3d 84, 90 (2d Cir. 2003). The identical standard of proof governs cases under Title VII and the ADEA. See, e.g., Bovers v. Flying Tiger Line Inc., 979 F.2d 291, 296 (2d Cir. 1992).[1]

Ruiz-Valera argues that she was subjected to illegal disparate treatment because (1) the defendant denied her promotion to a position for which she was qualified, (2) she received less substantial wage increases than fellow employees and was "constructively demoted" by means of the reduction of her responsibilities, and (3) she was terminated on discriminatory grounds. With respect to the promotion, we do not find a basis to conclude that Ruiz-Valera's qualifications for the position at issue are "so superior to the credentials of the person selected for the job that no reasonable person ... could have chosen the candidate selected over" her. Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001) (internal quotation marks and citation omitted). As to the

[1] The parties disagree as to whether Ruiz-Valera's complaint was timely filed. As with the district court, however, we will assume arguendo that the complaint is timely and proceed to consider the merits.

allegedly discriminatory wage increases,even if we assume arguendo that the claim is not time-barred, we do not find a basis to conclude that Ruiz-Valera has met her burden of demonstrating by a preponderance of the evidence that the reasons proffered by the defendant for the difference in wage increases are pretextual. Nor do we conclude that Ruiz-Valera has established that changes in her job responsibilities amount to an actionable "materially adverse change in the terms and conditions of [her] employment." Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (internal quotation marks and citations omitted). Finally, Ruiz-Valera has not established the pretextual character of the defendant's assertion that her termination, which was part of the elimination of her department as a whole, was motivated by cost considerations.

Ruiz-Valera also claims that her termination was a retaliatory measure taken in response to her complaints to the defendant regarding her treatment at the hands of her superiors. The district judge dismissed this claim because Ruiz-Valera had not objected to the magistrate judge's recommendation that the claim had no merit. See Thomas v. Am, 474 U.S. 140, 149 (1985). Even if we saw any reason to disturb the district judge's conclusion, we would agree with the magistrate judge that Ruiz-Valera has not made out a prima facie case of retaliation because she has not established that she made any complaint asserting that she had been subject to discrimination based upon her membership in a protected class. See Galdieri-Ambrosini v. Nat. Realty & Development Corp., 136 F.3d 276, 292 (2d Cir. 1998).

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **AFFIRMED.**

FOR THE COURT:
Roseann B. MacKechnie,
Clerk of Court

Appendix A

By:
Lucille Carr, Deputy Clerk

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 24, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHOEBE RUIZ-VALERA,	:	
Plaintiff,	:	
-against-	:	00-CIV-0165(KMW)(HBP)
	:	ORDER
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,	:	
Defendant.	:	

WOOD, U.S.D.J.:

Pro se plaintiff, a former employee in defendant's law library, alleges that she was the victim of race, gender and age discrimination, and that she was subjected to illegal retaliation, all in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act (the "ADEA"). The Court referred this action to Magistrate Judge Henry Pitman for pretrial management, including the determination of any dispositive motions. Defendant moved for summary judgment to dismiss the complaint. By report and recommendation dated February 27, 2002 (the "Report"), familiarity with which is assumed, Magistrate Judge Pitman recommended that the Court grant defendant's motion for summary judgment. For the reasons explained below, the Court adopts that recommendation and rejects plaintiff's objections (the "Objections").

Appendix B

I. Background

Because the facts giving rise to this action are set forth fully in the Report, see Report 1-8, the Court describes them here only briefly. Plaintiff, a former employee in defendant's law library, is a Hispanic female who began working at defendant in 1982. In 1985, plaintiff was promoted from the position of "head cataloger" to the position of "head of technical services." Plaintiff held that position until her termination in February 1999, at which point she was forty-nine years old.

Plaintiff's claims for discrimination arise out of events that allegedly occurred during the last two years of her employment at defendant. In early 1997, defendant advertised an opening for the position of "director of library services." Plaintiff interviewed for that position, but defendant ultimately hired a white woman, Elizabeth Henry Klampert ("Klampert"), who is about five months older than plaintiff. Klampert began her employment at defendant in July 1997. The relationship between plaintiff and Klampert was marked by substantial friction.

II. Discussion[1]

Plaintiff alleges violations of Title VII and the ADEA on the following grounds: (1) a hostile work environment; (2) discriminatory treatment and termination; and (3) retaliatory termination. On summary judgment, defendant argues that the Court should dismiss the complaint as untimely. In the alternative, defendant argues that each of plaintiff's claims should be dismissed on the merits. The Court assumes arguendo that the complaint was timely filed and thus turns to the merits.

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[1]In reviewing the Report, the Court may adopt those parts of it as to which no specific objection is raised, provided the findings are not clearly erroneous. SeeFed. R. Civ. Pro. 72(b); Thomas v. Arn, 474 U.S. 140, 149 (1985). However, with respect to those parts of the Report as to which any party objects, the Court must make a de novo determination. See United States v. Raddatz, 447 U.S. 667, 673-74 (1980); Grassia v. Sculls, 892 F.2d 16, 19 (2d Cir. 1989). Because the Court finds that no portion of the Report is clearly erroneous, it reviews de novo only those portions as to which plaintiff has specifically objected.

Appendix B

A. Hostile Work Environment

Plaintiff alleges that she was subjected to discrimination by virtue of a hostile work environment. As explained in the Report, a hostile work environment is actionable under Title VII and discrimination by virtue of the ADEA only if the alleged hostility is the product of discriminatory animus directed toward a person by virtue of his or her membership in a protected class. See Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999); accord Report 16-19. Plaintiff here offers evidence of the friction between herself and Klampert, and of an increasingly disagreeable work environment. However, plaintiff offers no evidence to support a claim that her work environment was rendered hostile on the basis of her membership in a protected class.[2] The Court, therefore, grants defendant's motion for summary judgment on the claim of a hostile work environment.

B. Discriminatory Treatment and Termination

Plaintiff alleges discriminatory treatment on the following bases: (1) a failure to promote; (2) disparate treatment; and (3) discriminatory termination. The Report sets forth fully the burden-shifting analysis applicable to these claims, and the Court reviews that law here only briefly. See Report 22-26. In determining whether plaintiff can defeat a motion for summary judgment on her claims for discrimination, the Court applies the three-part, burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973).

1. Failure to Promote

Plaintiff alleges discrimination on the basis of defendant's decision to hire Klampert for the position of director of library services, rather than to promote plaintiff to that position. Because Klampert is a woman who is approximately five

[2]Plaintiff asserts that "male supervisory staff were treated differently" from her. Objections 10. However, such self-serving, conclusory assertions that have no support in the evidence cannot defeat a motion for summary judgment. See Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996) ("Though we must accept as true the allegations of the party defending against the summary judgment motion, drawing all reasonable inferences in his favor, conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment.") (citation omitted).

months older than plaintiff, the Report assumes that plaintiff alleges discrimination, not on the basis of age, but only on the basis of race. To the extent that plaintiff objects to this assumption, the Court rejects her objections.[3]

The Report concludes that there are genuine questions of material fact as to whether plaintiff was "qualified" for the position of director of library services. Report 26-28. Because no party objects to this conclusion, the Court adopts it without further review. See Thomas v. Arn, 474 U.S. 140, 149 (1985) (district courts need not review issues to which no objection has been made).

The Report also concludes that, even though plaintiff has established a prima facie case of discrimination based on defendant's failure to promote her, plaintiff has not established that defendant's articulated, non-discriminatory reason for its action (i.e., that Klampert was more qualified than plaintiff) was a mere pretext for illegal discrimination. Report 28-32. Plaintiff files three objections to the Report's conclusion that she failed to demonstrate mere pretext. First, plaintiff argues that it was improper for the Report to consider the affidavit by Fern Schair ("Schair"), the executive secretary and chief administrative officer of defendant. According to plaintiff, it was improper for the Report to consider the Schair affidavit in that plaintiff did not depose Schair and thus did not have the opportunity to cross-examine her. The Court rejects this argument. The use of affidavits in support of a motion for summary judgment is permissible under Rule 56(b), Fed. R. Civ. Pro. Moreover, plaintiff's assertion that the Schair affidavit was "sprung" upon her improperly, without warning, see Objections 13, is ill-founded, in light of the facts: (1) that plaintiff had identified Schair as someone who possessed potentially relevant information, see Aff. of Howard Z . Robbins, dated Apr. 12, 2002, . Robbins, dated Apr. 12, 2002, Ex. 1 (plaintiff's responses

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[3]Although plaintiff's Objections are not clear on this point, plaintiff seems to assert that a genuine issue of material fact exists as to whether she was discriminated against on the basis of sex and age. In support of this assertion, plaintiff argues that "an inference can be drawn" from these facts: (1) Klampert held the position of director of library services for less than two years; (2) when Klampert left, a young, white male became "acting director"; and (3) defendant has not yet hired someone to fill the position permanently. Objections 16. The Court rejects this objection, to the extent that plaintiff makes it, because such evidence does not give rise to an inference of discrimination on the basis of sex and age.

to defendant's interrogatories); and (2) that plaintiff never requested the opportunity to depose Schair.

Second, plaintiff argues that she has demonstrated mere pretext by demonstrating that she was qualified for the position, or that, in her subjective opinion, she was more qualified than Klampert. Although plaintiff's evidence might support a finding that she was qualified for the position, it does not support a finding that defendant's contention that it assessed Klampert's qualifications as superior to those of plaintiff is a mere pretext for illegal discrimination. The Court must respect an employer's discretion to choose among qualified candidates. See Byrnie v. Cromwell Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001) (citation omitted). A plaintiff relying only on her qualifications to establish that the defendant's stated reason is a mere pretext must demonstrate that her credentials are "so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Id. (internal quotation marks and citation omitted). The Court finds that plaintiff cannot demonstrate that her credentials were "so superior" to Klampert's, in light of the facts: (1) that Klampert has a juris doctorate ("J. D."); (2) that plaintiff does not have a J.D.; and (3) that, when defendant advertised for the position of director of library services, it listed a J.D. as "desirable," see Aff. of Schair, dated June 13, 2001, Ex. 1.

Finally, plaintiff argues that defendant's discriminatory intent is evident from defendant's failure to hire a qualified, African-American female, Eviana Anne Thompson ("Thompson"), for the position of director of library services. As explained in the Report, the fact that defendant hired a qualified, white woman instead of a qualified, Hispanic woman or a qualified, black woman does not, on its own, demonstrate that defendant discriminated against plaintiff, or that defendant's articulated reason is a mere pretext for discrimination. Report 30-32. For the reasons explained in the Report, Thompson's affidavit does not establish that Thompson was the victim of discrimination. Id. at 31. Moreover, even if Thompson's affidavit established discrimination against Thompson, it would not be probative of any discrimination against plaintiff. For plaintiff's "statistical" evidence to be probative of discrimination against plaintiff, the sample size must be large enough to permit an inference that plaintiff's protected status was a determinative factor in the adverse decision against her. See, e.a., Haskell v.

Kamon Corp., 743 F.2d 113, 121 (2d Cir. 1984); Allevne v. Four Seasons Hotel--New York, 2001 WL 135770, *12 (S.D.N.Y. Feb 15, 2001) (citing cases).[4] Plaintiff's sample size of two (herself and Thompson) does not permit such an inference.

2. Disparate Treatment

In claiming disparate treatment, plaintiff contends: (1) that, in 1997 and in 1998, she received smaller raises than three of her male counterparts; and (2) that she was constructively demoted. The Report concludes that plaintiff's contention concerning the size of her raises is time-barred for failure to file an administrative charge of discrimination with the Equal Employment Opportunity Commission within the statutorily prescribed period. Report 33-34. In the alternative, the Report concludes that this claim is without merit. Plaintiff did not object to the conclusion that this claim is time-barred, and the Court, therefore, adopts the conclusion without further review. Thomas v. Arn, 474 U.S. at 149.

Plaintiff's second contention is that defendant constructively demoted her by minimizing her managerial duties and effectively transforming her into a clerk. Objections 20-22. For the shift in plaintiff's responsibilities to be actionable, plaintiff must have experienced a "materially adverse change in the terms and conditions of employment." Galabva v. New York City Bd of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (internal quotation marks and citations omitted). The adverse change must be more than a mere inconvenience or alteration of job responsibilities. See, e.a., Id.; Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997); Davis v. City University, 1996 WL 243256, *8 (S.D.N.Y. May 9, 1996). For the reasons explained in the Report, the Court finds that plaintiff has not established that she experienced anything more than legally insubstantial changes in her work conditions. Plaintiff's conclusory assertions to the contrary are simply unsupported by the evidence. See Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996). The Court thus adopts the Report's conclusion that plaintiff

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4Plaintiff makes numerous, conclusory assertions that defendant hired only white men to fill positions of authority. However, these assertions are not supported by evidence and thus do not defeat defendant's motion for summary judgment. Kulak, 88 F.3d at 71.

has not established a prima facie case that the change in her responsibilities constituted an adverse employment action. Report 41-42. In addition, the Court adopts the Report's alternative conclusion, that assuming arguendo that plaintiff has established her prima facie case of an adverse action, plaintiff has not established that defendant's asserted reasons for the modification were a mere pretext for illeg.al discrimination. Id. at 42-43.

3. Discriminatory Termination

Although it is unclear from her submissions, plaintiff's claim for discriminatory termination seems to rest on many of the allegations considered above. For the reasons explained in the Report, the Court finds that, even if the Court assumes arguendo that those allegations establish a prima facie case of discriminatory termination, plaintiff cannot demonstrate that defendant's stated reason was a mere pretext for discrimination. Report 43-46. Defendant states that it terminated plaintiff, and others in her department, to cut the costs of cataloging, and defendant offers evidence to this effect. Aff. of Klampert, dated June 13, 2001, at ¶ 6 & Ex. 2 (estimated costs of maintaining in-house cataloging personnel versus outsourcing the job of cataloging). The Court, therefore, grants defendant summary judgment on plaintiff's claim of discriminatory termination.

D. Retaliatory Termination

Plaintiff does not object to the Report's conclusion in favor of defendant on plaintiff's claim for retaliation. The Court thus adopts that conclusion without further review. Thomas v. Arn, 474 U.S. at 149.

III. Conclusion

For the reasons explained above, the Court adopts the recommendation made in the Report. Accordingly, the Court grants defendant's motion for summary judgment dismissing the complaint. The Clerk of the Court is directed to close this case. Any pending motions are moot.

SO ORDERED.

Appendix B

Dated: New York, New York
September 24, 2002

Kimba M. Wood

United States District Judge

Copies of this Order have been mailed to pro se plaintiff and to counsel for defendant.

APPENDIX C - REPORT AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE TO THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHOEBE RUIZ-VALERA,	:	
Plaintiff,	:	00 Civ. 0165 (KMW)(HB
-against-	:	REPORT AND RECOMMENDATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK	:	
Defendant.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE KIMBA M. WOOD, United States District Judge,

I. Introduction

Defendant, the Association of the Bar of the City of New York ("ABCNY"), moves for summary judgment dismissing the complaint. For the reasons set forth below, I respectfully recommend that the motion be granted.

II. Facts

This is an employment discrimination action in which the pro se plaintiff,

a former employee in the ABCNY law library, alleges that she was the victim of race, gender and age nation and was subjected to illegal retaliation, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. (the "ADEA"). As a result of the alleged discrimination, plaintiff claims that she was subjected to a hostile environment and unequal terms and conditions of employment, denied a promotion, constructively demoted and ultimately terminated (Complaint at page 3).

Plaintiff is an Hispanic female who was 49 years of age on the date of her termination in February 1999 (Complaint at page 3). Plaintiff received a Bachelors of Arts Degree from Westminster College, a Masters Degree in Library Services from Rutgers University Graduate School of Library Service and a Masters of Arts in Linguistics from New York University Graduate School of Arts and Science (Complaint at page 8; Plaintiff's Statement of Material Facts at ¶ 4). Prior to her being hired by defendant, plaintiff had worked for nine years in public and university libraries (Plaintiff's Statement of Material Facts at ¶ 5).

Plaintiff was hired by the ABCNY in 1982 as Head Cataloger (Complaint at page 8; Defendant's Statement of Material Facts Pursuant to Rule 56.1 at ¶ 2[1]). In 1985, plaintiff was promoted to Head of the Technical Services Department, a position she held until her termination in February 1999 (Defendant's Statement of Material Facts Pursuant to Rule 56.1 at ¶ 2).

Plaintiff's claims arise out of events which allegedly occurred during the last two years of her tenure with the ABCNY. The earliest event of which plaintiff complains was defendant's failure to promote her to the position of director of the library. In early 1997, the ABCNY advertised for the position of Director of Library Services (Affidavit of Fern Schair, sworn to June 13, 2001 ("Schair Aff."), ¶ 4). The advertisement stated:

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[1]Unless otherwise indicated, my reliance on Defendant's Statement of Material Facts Pursuant to Local Civil Rule 56.1 is limited to those statements which plaintiff does not dispute.

Appendix C

> **Position requires MLS and 10+ years significant law library experience, technological knowledge important, JD desirable. Duties include collection planning, development and maintenance, library technology & training center, supervision of superb staff and operations, budget and development.**

(Schair Aff., Ex. 1).

Although plaintiff interviewed for the position, it was ultimately given to Elizabeth Henry Klampert, who had not previously worked for the ABCNY. At the time she was hired by defendant, Klampert held a Bachelor's Degree in English literature, a Master's Degree in Library Science and a Juris Doctor degree; she was admitted to practice law in New York (Affidavit of Elizabeth Henry Klampert, sworn to June 13, 2001 ("Klampert Aff."), ¶ 3). Klampert had worked in the libraries of several financial institutions from 1978 through 1985 and had served as Assistant Chief Librarian at the firm of White & Case from 1994 through 1997(Klampert Aff. ¶ 4). While at White & Case, Klampert supervised a staff of sixteen people (Klampert Aff. ¶ 4).[2]

Klampert started working at the ABCNY in July 1997 (Defendant's Statement of Material Facts Pursuant to Rule 56.1 at 1 4), and the relationship between Klampert and plaintiff was marked by substantial friction. Klampert held weekly meetings with plaintiff (Deposition of Phoebe Ruiz-Valera, conducted on October 23, 2000, annexed as Exhibibit 2 to the Declaration of Mark S. Filipini, dated June 13, 2001 ("Ruiz-Valera Dep."), at 10). According to plaintiff, these meetings were merely occasions for Klampert to criticize plaintiff's work. When asked about the purpose of the meetings, plaintiff testified:

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[2]Plaintiff notes in her submission that at least one other individual, Evania Thompson, interviewed for the position of director of the library. Ms. Thompson is an African-American female who holds a Masters Degree in Library Science and a Juris Doctor degree. At the time she applied to defendant, she had nine years of experience at an institutional law library (Affidavit of Evania Thompson, Esq., sworn to June 29, 2001 ("Thompson Aff."), ¶¶ 4-6).

> I don't know [what the purpose was], to tell you the truth, other than to interfere with the work of the department and to annoy me, because I must tell you that nothing was accomplished at them. She never asked me what we did. She would tell me she wanted this or that done without any kind of interest in the consequences, and when I would try to explain, as head of the department, what it would mean -- after all, this is an old established library -- she would inform me that I could leave.

(Ruiz-Valera Dep. at 10).

Plaintiff claims that her duties were diminished during Klampert's tenure and that this reallocation of duties constituted a constructive demotion. Specifically, plaintiff alleges

> Younger personnel were introduced to begin taking over the duties of [my Department] and reporting directly to the Director rather than to me as Head of the [Department]. Although both Shirliene Bonilla and Jocelyn Rivera were working in my [Department] and I was expected to train them they were reporting to the Director. Furthermore, [Klampert] appointed the Director of Library Operations, Richard Tuske, and Michael Leventhal,the Head of the Technology Center, to be responsible for [the] physical and computer operations in the [Department] and I was asked to train them. These two white males lack formal education in bibliographic control, (i..e. no Masters of Library Science degree). This partitioning was necessary since I had always been responsible for the physical conditions of the [Department] and was the System Administrator for the Online Public Access Catalog.

(Statement/Affidavit annexed to the Complaint herein ("Statement/Affidavit") at ¶2).

Plaintiff also claims that the raises she received in 1997 and 1998 -- 3%

in each year -- were smaller than the raises received by three white males employed in the library (Defendant's Statement of Material Facts Pursuant to Rule 56.1 at ¶¶ 21-23). These raises were granted in mid-April of each year (Defendant's Statement of Material Facts Pursuant to Rule 56.1 at ¶ 24).

In a June 29, 1998 memo from Klampert to Barbara Opotowsky, defendant's Executive Director, defendant first considered out-sourcing the cataloging work done by plaintiff's department (Klampert Aff. ¶ 6 and Ex. 1 thereto; Deposition of Barbara Opotowsky, conducted on November 29, 2000, annexed as Exhibit 3 to the Declaration of Mark S. Filipini, dated June 13, 2001 ("Opotowsky Dep."), at 16-19). The memo stated in substance that the library's existing staff was cataloging publications at a substandard rate and that cost savings would be realized by out-sourcing (Klampert Aff. Ex. 1). In December 1998, ABCNY decided to out-source the functions performed by plaintiff's department and to terminate plaintiff and her subordinates (Klampert Aff. ¶ 7; Opotowsky Dep. at 17-18). According to Klampert, the actual firings were deferred until after the beginning of 1999 "as a courtesy" to the individuals who were to be fired (Klampert Aff. ¶ 8); presumably, this means that defendant was trying to avoid firing plaintiff and her subordinates in the middle of the Christmas holidays.

On or about January 12, 1999, plaintiff met with Georgiana Hsu-Luk, defendant's Director of Human Resources, and "discussed the hostile work environment created for the Technical Services [Department] by Klampert" (Plaintiff's Statement of Material Facts at ¶ 13). It appears, however, that the hostility of which plaintiff complained was the result of Klampert's management style and not the result of ridicule or humiliation attributable to race-based, gender-based or age-based animus. Plaintiff described this January 1999 meeting as follows:

> I . . . mentioned my staff was getting sick. They had told me they didn't want to come to work any more, that they felt terrible.
>
> Now, this is an Asian person, Nita Florentino, who had cancer and had been out for a couple of weeks and c[a]me back

part time and finally on a more full time schedule.

There was Merlene Jackson, and MLS, she had a professional degree. She's black. And they were complaining about the things they were expected or required to do and about the whole treatment, and that's what I told Ms. Hsu-Luk.

Q. The whole treatment, what are you referring to?

A. The memos from Ms. Klampert were about our procedures. Every day there was a new memo, contradictions. She didn't go by policies. I tried to get her to issue policies, because in a large library that's what you need. You can't look at each and every item the way you might in a smaller one. And she just wouldn't do that.

So there was a lot of contradictions, a lot of things where we had to shift in the middle, which we did. We tried to accommodate her as best we could.

Q. You said that you complained of a hostile work environment to Ms. Hsu-Luk in this meeting?

* * *

A. Well, I said that -- I showed her some memos and I left them with her, that we had received from Ms. Klampert, that were insulting.

Q. Do you recall what memos you showed her?

A. Yes. One about opening the mail from the mailroom and another one about retrospective collection where.-- where she wanted to install quotas, and I had already discussed that with

Ms. Klampert, that in a professional environment librarians do not have quotas. We may be catalogers and handle items, but we do not work on a quota system.

A. Any other memos you showed her?

Q. There might have been another one. I can't remember. But I did say that this contributed to a hostile work environment and not a professional one.

* * *

Q. Can you tell me everything that you said to her?

* * *

A. Well, as best I can recall, I explained about the hostile work environment, that my staff was getting sick, that they didn't want to come to work, that we were receiving memos from her and -- from the director. I showed her the memos, that she was interfering with our work, that on a day-to-day basis we were not able to proceed and do our work, and that I wanted that recorded, that I had been there to see her.

And she told me she would put a memo in my file, which I never saw. She was supposed to -- it's procedure or has been at the Association that any time a meeting is held with personnel, that you do receive a copy of the memo that's placed in the file.

(Ruiz-Valera Dep. at 22-27).

Plaintiff was formally terminated on February 4, 1999 (Plaintiff's Statement of Material Facts ¶ 15).

Plaintiff filed her complaint with the Equal Employment Opportunity

Commission ("EEOC") on or about July 31, 1999, alleging discrimination on the basis of race, sex and age and also alleging retaliation. The EEOC issued plaintiff a right to sue letter on September 30, 1999. Plaintiff filed the complaint in this action with the Office of the Pro Se Clerk on January 4, 2000; it was subsequently assigned a docket number by the Clerk of the Court on January 10, 2000. As a matter of law, the action must be deemed to have been received by the Court on January 4, 2000, when it was received by the Pro Se Clerk. See Rosenberg v. Martin, 478 F.2d 520, 523 n.la (2d Cir. 1973); French v. United States Trust Co., 84 Civ. 868 (RJW), 1984 WL 3141 at *1 (S.D.N.Y. June 19, 1984).

III. Analysis

A. Summary Judgment Standard

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> To prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). In deciding such a motion, the district court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. Giano v. Senkowski, 54 F.3d 1050, 1052 (2d Cir. 1995).

Hemphill v. Schott, 141 F.3d 412, 415 (2d Cir. 1998). See also Soloaub v. City of New York, 202 F.3d 175, 178 (2d Cir. 2000); Belfi v. Prendergast, 191 F.3d 129, 135 (2d Cir. 1999); Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736, 742 (2d Cir. 1998); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997).

Once the moving party has met its initial burden of demonstrating the absence of a genuine issue of material fact, the non-moving party, in order to

defeat the motion, "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party "must set forth specific facts showing that there is a genuine issue for trial" in order to avoid summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Summary judgment is "ordinarily inappropriate" in discrimination cases, such as this one, where the employer's intent and state of mind are in dispute. Carlton v. Mystic Transp.,Inc., 202 F.3d 129, 134 (2d Cir.), cert. denied, 530 U.S. 1261 (2000). See, Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985). Moreover, in discrimination cases

> summary judgment may not be granted simply because the court believes that the plaintiff will be unable to meet his or her burden of persuasion at trial. . . . There must either be a lack of evidence in support of the plaintiff's position, . . . or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error.

Danzer v. Norden Sys., Inc., 151 F.3d 50, 54 (2d Cir. 1998). See Weber v. Parfums Givenchy, Inc., 49 F. Supp.2d 343, 354 (S.D.N.Y. 1999) (same).

Although the central role of intent must occasion the exercise of caution in addressing a summary judgment motion made in a discrimination case, "'the salutary purposes of summary judgment -- avoiding protracted, expensive and harassing trials - - apply no less to discrimination cases than to . . . other areas of litigation.'" Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 466 (2d Cir.), denied, 122 S.Ct. 460 (2001), quoting Meiri v. Dacon, supra, 759 F.2d at 998. Thus, the Court of Appeals for the Second Circuit has expressly "remind[ed the] district courts that the 'impression that summary judgment is unavailable to defendants in discrimination cases is unsupportable.'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000), quoting McLee v. Chrysler Corp., 38 F.3d 67, 68 (2d Cir. 1994). "[E]ven where an employer's intent is at issue, 'a plaintiff

must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment.'" Bennett v. Watson Wyatt & Co., 136 F. Supp.2d 236, 245 (S.D.N.Y. 2001), quoting Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). See generally James v. New York Racing Ass'n, 233 F.3d 149 (2d Cir. 2000) (affirming grant of summary judgment in age discrimination case); Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000) (same); Elliott v. British Tourist Auth., 96 Civ. 9154 (NRB), 2001 WL 435633 (S.D.N.Y. Apr. 30, 2001) (grant of summary judgment in age discrimination case).

B. Defendant's Arguments

The ABCNY asserts that it is entitled to summary judgment for five different reasons. First, it asserts that the action is untimely because it was not commenced within ninety days of the date on which plaintiff presumptively received her right to sue letter. Second, the ABCNY argues that plaintiff's hostile environment claim must fail because there is no evidence of environmental hostility on the basis of discriminatory animus against a protected characteristic. Third, it argues that plaintiff's disparate treatment claims must fail because they are untimely in part, one aspect of plaintiff's disparate treatment allegations fail to establish a prima facie case and that, in any event, plaintiff has failed to rebut defendant's non-discriminatory reasons for the employment decisions in issue. Fourth, ABCNY contends that plaintiff's discriminatory discharge claim fails because plaintiff has failed to establish a prima facie,case and because there is no evidence that the non-discriminatory reason given by defendant for the termination was actually a pretext for illegal discrimination. And, fifth, defendant argues that plaintiff's retaliation claim must fail because she does not allege that she protested or took action against any activity prohibited by Title VII or the ADEA and that, in any event, there is no evidence to rebut the non-discrimnatory reasons proffered by defendant for terminating plaintiff's employment.

1. Timeliness

ABCNY first argues that it is entitled to summary judgment because plaintiff did not commence this action within ninety days of her receipt of a right

to sue letter from the EEOC.

Both Title VII and the ADEA require that civil actions be commenced no later than ninety days after the claimant's receipt of a right to sue letter. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e); Hodge v. New York Coll. of Podiatric Med., 157 F.3d 164, 168 (2d Cir. 1998) (ADEA); Sherlock v. Montefiore Med. Ctr., 84 F.3d 522, 525 (2d Cir. 1996) (Title VII). "While the 90-day rule is not a jurisdictional predicate, 'in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day.'" Johnson v. Al Tech Specialties Steel Corp.,731 F.2d 143, 146 (2d Cir. 1984), quoting Rice v. New England College, 676 F.2d 9, 11 (1st CIF. 1982). Accord Dungeon v. Rosen, 96 CIF. 6785 (DLC), 1998 WL 3351 at *1 (S.D.N.Y. Jan. 5, 1998).

"[Normally it may be assumed, in the absence of challenge, that a notice provided by a government agency has been mailed on the date shown on the notice." Sherlock v. Montefiore Med. Ctr., supra, 84 F.3d at 526. Thus, there is a presumption that a right to sue letter is received by the plaintiff three days after the date it bears. Sherlock v. Montefiore Med. Ctr., supra, 84 F.3d at 525-26, citing Baldwin County Welcome Ctr. v. Brown, 466 US. 147, 148 n.1 (1984) (per curiam).

The presumption concerning a claimant's date of receipt is rebuttable. "If a claimant presents sworn testimony or other admissible evidence from which it could reasonably be inferred either that the notice was mailed later than its typewritten date or that it took longer than three days to reach her by mail, the initial presumption is not dispositive." Sherlock v. Montefiore Med. Ctr., supra, 84 F.3d at 526.

In this case, the right to sue letter is dated September 30, 1999, was presumptively mailed on that day and was presumptively received by plaintiff on October 3, 1999. The ninety-day period from this date expired on January 1, 2000. Since January 1, 2000 was a Saturday and holiday, the ninety day filing period would be extended to the next business day -- Monday, January 3, 2000. Fed.R.Civ.P. 6(a). Thus, unless plaintiff rebuts the presumption concerning the date on which she received the right to sue letter, her claims are time barred.

Although the complaint alleges that plaintiff received the right to sue letter on October 7, 1999, plaintiff has not submitted any affidavit, affirmation or other sworn statement confirming that date. This mission cannot be explained

away through plaintiff's lack of familiarity, as a pro se litigant, with the requirements of Rule 56. Defendant's motion was accompanied by the notice required by Local Civil Rule 56.2, which expressly warned plaintiff that she could "NOT oppose summary judgment simply by relying upon the allegations in [her] complaint" (Defendant's Notice to Pro Se Litigant Opposing Motion For Summary Judgment at 2 (emphasis in original)). Moreover, plaintiff did submit an affirmation made in accordance with 28 U.S.C. § 1746 addressing other aspects of defendant's motion and also submitted deposition excerpts and other materials of evidentiary weight. Thus, it appears that plaintiff understood her obligation to respond to defendant's motion, but, nevertheless, failed to submit any evidence concerning the date on which she received her right to sue letter.

The only other response offered to this aspect of defendant's motion is plaintiff's contention, unsupported by any evidence, that she mailed the complaint to the Court on January 3, 2000 (see Plaintiff's Brief in Opposition to Summary Judgment at 2). This argument is unpersuasive. Title VII and the ADEA require that a civil action be brought within ninety days of the claimant's receipt of a right to sue letter. The Federal Rules of Civil Procedure provide that an action is commenced by "filing" a complaint with the Court. Fed.R.Civ.P. 3. "Filing," in turn, requires that the papers actually be received by the Court; with the exception of filings by incarcerated inmates, material mailed to the Court is not "filed" until it is actually received by the Court. United States v. White, 980 F.2d 836, 845 (2d Cir. 1992); Sandal v. United States, 00 CIF. 1259 (AGE), 2001 WL 300729 at *4 (S.D.N.Y. Mar. 28, 2001); Crawford-Mulley v. Corning Inn., 77 F. Supp.2d 366, 368 (W.D.N.Y. 1999). Thus, even if I assume that plaintiff did in fact mail the complaint to the Court on January 3, 2000, such mailing did not constitute a filing until the complaint was actually received by the Court.

Since plaintiff has offered no evidence whatsoever to create an issue of fact concerning the date on which she received the right to sue letter and has offered no legal justification for her failure to commence this action within ninety days of the date on which she presumptively received the right to sue letter, summary judgment should be granted to defendant on the ground that the action was not timely commenced. Although plaintiff's default was of only one day's duration, the court does not have the power to excuse it. See, Baldwin County Welcome Ctr. v. Brown, supra, 466 U.S. at 152 ("[p]rocedural requirements estab-

lished by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants"); Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) ("strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

Although I conclude that plaintiff's complaint is time barred in its entirety, I shall, nevertheless, address the merits of plaintiff's claims in order to minimize the possibility of a remand.

2. Hostile environment Claim

Defendant next claims that it is entitled to summary judgment because there is no evidence of environmental hostility directed at any of the protected characteristics asserted by plaintiff.

A hostile work environment claim has three or four elements, depending upon who committed the actions giving rise to the claim.

> To show that she was subjected to . . . discrimination by virtue of a hostile work environment, [plaintiff] must ultimately prove "conduct (1) that is 'objectively' severe or pervasive -- that is, [conduct that] creates an environment that a reasonable person would find hostile or abusive [the 'objective' requirement], (2) that the plaintiff 'subjectively perceive[s]' as hostile or abusive [the 'subjective' requirement], and (3) that creates such an environment because of plaintiff's [membership in a protected class] [the 'prohibited causal factor' requirement]." Gregory v. Daly, 243 F.3d 687, 691-92 (2d Cir. 2001) (internal citations and quotation marks omitted, all but first brackets in original). Because [plaintiff] claims harassment by co-workers, not supervisors, she must also show (4) that [defendant] is responsible for the continued hostility of the work environment. See Distasio, 157 F.3d at 62.

Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001). See also Harris v. Forklift

Sys., Inc., 510 U.S. 17, 21-22 (1993); Brennan v. Metropolitan Opera Ass'n, 192 F.3d 310, 318 (2d Cir. 1999); Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d CIF. 1997).

The type of conduct that will support a hostile work environment claim must be severe and pervasive:

> Title VII forbids actions taken on the basis of sex that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Faragher v. Boca Raton, 524 U.S. 775, 786, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986) (some internal quotation marks omitted)). See also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (Only harassing conduct that is "severe or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Faragher v. Boca Raton, supra, at 787-788, 118 S.Ct. 2275 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). Hence, "[a] recurring point

> in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. Boca Raton, supra, at 788, 118 S.Ct. 2275 (citation and quotation marks omitted).

Clark County School Dist. v. Breeden, 532 U.S. 268, 270-71 (2001) (per curiam). Ordinarily, sporadic derogatory comments concerning a protected class will not support a hostile environment claim. Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000). In determining whether the level of workplace misconduct constitutes an actionable "hostile environment," no single factor is determinative; rather, the Court must consider the totality of the circumstances. Raniola v. Bratton, 243 F.3d 610, 617 (2d Cir. 2001); Cruz v. Coach Stores Inc., 202 F.3d 560, 570 (2d Cir. 2000).

On the present motion, the principal issue is not so much the sufficiency of the evidence to sustain a finding that plaintiff was subjected to a hostile environment, but whether there is sufficient evidence to sustain a finding that plaintiff was subjected to a hostile environment as a result of her race, gender or age or in retaliation resulting from her having engaged in activity that is protected under Title VII or the ADEA.

As noted above, environmental hostility is actionable only if it is the product of discriminatory animus directed toward a protected characteristic. "A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class." Brennan v. Metropolitan Opera Ass'n., supra, 192 F.3d at 318 (emphasis added). Addressing the same issue in the context of a claim of race-based environmental hostility, the Court of Appeals for the Seventh Circuit noted:

> Federal law provides that an employee is to be free from racial discrimination in the workplace, which includes freedom from a racially-hostile work environment. It does not guarantee a utopian workplace, or even a pleasant one. If the workplace is unsavory for any reason other than hostility generated on the basis of race, gender, ethnicity, or religion, no federal claim is implicated. In

> short, personality conflicts between employees are not the business of the federal courts.

Vore v. Indiana Bell. Tel. Co., 32 F.3d 1161, 1162 (7th Cir. 1994); accord Waite v. Blair Inc., 937 F. Supp.2d 460, 468 (W.D. Pa. 1995).

In this case, plaintiff has cited no evidence that would support a finding that plaintiff was subjected to a hostile environment on the basis of her membership in any of the protected classes cited in the complaint or in retaliation for her having engaged in activity that was protected under either Title. VII or the ADEA. Plaintiff admitted at her deposition that she never heard anyone make derogatory comments about her age, race or gender (Ruiz-Valera Dep. at 71-72). Plaintiff concedes that the alleged harassment took place through Klampert's requiring the Technical Services Department to perform certain functions and to alter certain procedures such as stamping invoices, opening mail, ceasing to process certain reporters, changing the classification of certain reading room materials, changing labels on books, changing the manner in which invoices were presented to the Treasurer and other similar matters (Defendant's Statement of Material Facts Pursuant to Rule 56.1 at ¶ 6; Plaintiff's Response to Statement of Material Facts at ¶ 6). However, plaintiff does not cite a whit of evidence that even circumstantially supports an inference that any of the acts constituting the allegedly hostile environment were motivated by illegal discriminatory animus.

Indeed, the best evidence of the poverty of plaintiff's hostile environment claim is her own response to defendant's motion.

> A hostile work environment was evident in the constructive demotion and [my] exclusion from any managerial decisions. Although I was Head of Technical Services, Klampert refused to hear anything I had to say about how the department or library was organized, or the impact on other procedures (such as audit reports) of changes to established procedures . . . . Every Friday Klampert held meetings with me . . . with a view to forcing my resignation. I felt insulted, ridiculed and degraded. I stated to her that she was alarming and annoying me . . . .

(Plaintiff's Brief in opposition to Summary Judgment at 3; see also Ruiz-Valera Dep. at 8, 13-17, 142-46). Plaintiff simply fails to cite any evidence that even remotely suggests that illegal discriminatory animus played a role in any of the acts plaintiff perceives as creating a hostile environment.

Although it is probably possible, at least in theory, for a management style to constitute a hostile environment, the authorities cited above teach that such an environment is actionable only if illegal discriminatory animus plays a role in causing the hostile environment. In this case, even if I make the generous assumption that plaintiff has offered evidence that would support a finding that she worked in an environment that was hostile, there is no evidence whatsoever that the hostility was motivated, in any degree, by animus towards plaintiff's race, gender or age or that plaintiff was subjected to hostility in retaliation for her having engaged in protected activity. Accordingly, defendant is also entitled to summary judgment on plaintiff's hostile environment claim. See Cross v. FPP Operating Partners, L.P., 799CV160-R, 2001 WL 1143159 at *11 (N.D. Tex. Sept. 25, 2001) (granting defendant summary judgment where unpleasant work environment did not constitute a "racially hostile environment" (emphasis in original)); Irvine v. Video Monitoring Servs., L.P., 98 Civ. 8725 (NRB), 2000 WL 502863 at *4 (S.D.N.Y. May 4, 2000) (granting summary judgment where there was no evidence that plaintiff's age motivated the allegedly hostile conduct); Scott V. Central School Supply, Inc., 913 F. Supp. 522, 529 (E.D. Ky. 1996), aff'd, 121 F.3d 709 (6th Cir. 1997) (granting defendant judgment as a matter of law where there was no evidence that hostile behavior was "based on sex"); Arzate v. City of Topeka,884 F. Supp. 1494, 1503 (D. Kan. 1995) (granting defendant judgment as a matter of law where alleged acts of hostility were due to personality conflicts and not illegal discriminatory animus).

3. Failure-to-Promote and
Disparate Treatment Claims

Plaintiff next argues that she was denied a promotion and subjected to disparate treatment as a result of illegal discrimination.

These aspects of plaintiff's claim are analyzed under the familiar "burden shifting" framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S.

792, 802 (1973). [3]See Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000); Woroski v. Nashua Corp., 31 F.3d 105, 108 (2d Cir. 1994), abrogated on other grounds, Schnabel v. Abramson, supra, 232 F.3d 83. See also Weber v. Parfums Givenchy, Inc., supra, 49 F. Supp.2d at 345. Initially, the burden is on the plaintiff to establish a prima facie case of discrimination.

> In an employment discrimination case, the plaintiff has the initial burden of "proving by the preponderance of the evidence a prima facie case of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); see St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (noting plaintiff's burden); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (same). In order to establish a prima facie case of age discrimination, the plaintiff must show that he was (1) within the protected age group; (2) qualified for the position; (3) discharged [or subjected to other adverse employment action]; and (4) that such discharge [or other adverse employment action] occurred under circumstances giving rise to an inference of discrimination. See Norton v. Sam's Club, 145 F.3d 114, 118 (2d Cir. 1998); Gallo, 22 F.3d at 1224. The burden of establishing a prima facie case is not a heavy one. One might characterize it as minimal. See St. Mary's Honor Ctr., 509 U.S. at 506, 113 S.Ct. 2742; Scaria v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997) (per curiam); Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994) (describing the burden of production as de minimis).

Carlton v. Mystic Transp., supra, 202 F.3d at 134. See Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001); Slattery v. Swiss Reins. Am. Corp., 248 F.3d 87, 91-92 (2d Cir. 2001), cert. denied, 122 S. Ct. 348 (2001); Galabya v. New

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[3]Although McDonnell Douglas was itself a Title VII case, its analytic framework applies with equal force to claims asserted under the ADEA. Abdu-Brisson v. Delta Air Lines, Inc., supra, 239 F.3d at 466.

York City Bd. of Educ., 202 F.3d 636, 639 (2d Cir. 2000).

If a plaintiff succeeds in establishing a prima facie case of discrimination, a presumption is created "that the employer discriminated against the employee in an unlawful manner," Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998), and the burden then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for its actions. Carlton v. Mystic Transp. Inc., supra, 202 F.3d at 134; Gallo v. Prudential Residential Servs., supra, 22 F.3d at 1224; Bickerstaff v. Vassar Coll., 196 F.3d 435, 446 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000).

> The defendant's burden of production also is not a demanding one; [it] need only offer such an explanation for the employment decision. . . . Although the burden of production shifts to the defendant, the ultimate burden of persuasion remains always with the plaintiff. . . .

Bickerstaff v. Vassar Coll., supra, 196 F.3d at 446 (citations omitted).

If the employer articulates a non-discriminatory reason for the termination or other adverse employment action, the presumption of discrimination raised by the prima facie case "simply drops out of the picture." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993). See Carlton v. Mystic Transp., Inc., supra, 202 F.3d at 134-35. At this point, the burden shifts back to the plaintiff to offer proof that would allow a rational factfinder to conclude that the employer's proffered reason for the adverse employment action was pretextual. St. Mary's Honor Ctr. v. Hicks, supra, 509 U.S. at 507-08; Carlton v. Mystic Transp., Inc., supra, 202 F.3d at 135. "Although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production . . . the trier of fact may still consider the evidence establishing plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual . . . .'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000), quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981); Griffin v. Ambika Corp., 103 F. Supp.2d 297, 307 (S.D.N.Y. 2000). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to

conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Prods., Inc., supra, 530 U.S. at 148.

In Schnabel v. Abramson, supra, 232 F.3d at 90, the Second Circuit explained the Supreme Court's decision in Reeves as follows:

> In examining the impact of Reeves on our precedents, we conclude that Reeves prevents courts from imposing a per se rule requiring it all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext . . . . But the converse is not true; following Reeves, we decline to hold that no ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in Reeves clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." Reeves, 530 U.S. at [143], 120 S.Ct. at 2106 (internal quotation marks omitted).

Furthermore, in James v. New York Racing Ass'n, supra, 233 F.3d at 155-56, the Second Circuit explained that proof of the falsity of the employer's non-discriminatory explanation does not automatically establish illegal discrimination:

> We reasoned in Fisher that "evidence constituting a prima facie case prior to the employer's proffer of a reason, coupled with the error or falsity of the employer's proffered reason may -- or may not -- be sufficient to show illegal discrimination." Fisher, 114 F.3d at 1333. In nearly identical terms the Supreme Court explained in Reeves that in some circumstances, a prima facie case plus falsity of the employer's explanation can, without more, be enough to support a reasonable finding that prohibited discrimination has occurred, and thus that

> a plaintiff may, under those circumstances, reach the jury on this evidence and without additional evidence, but that in other circumstances, a prima facie case, combined with falsity of the employer's explanation, will not be sufficient.

"The task . . . is to examine the entire record and, in accordance with Reeves, make the case-specific assessment as to whether a finding of discrimination may reasonably be made." Zimmermann v. Associates First Capital Corp., 251 F.3d 376, 382 (2d Cir. 2001).

a. Failure to Promote.

Plaintiff's failure to promote claim is based on defendant's 1997 decision to hire Klampert as Director of Library Services over plaintiff. Klampert was born in 1949 and was approximately five months older than plaintiff (Complaint ¶ 7; Klampert Aff. ¶ 2). Since Klampert is actually older than plaintiff and, like plaintiff, is a woman, I assume that plaintiff is claiming that defendant's hiring of Klampert constituted discrimination on the basis of race, but not on the basis of age or gender. Defendant claims that it is entitled to summary judgment on this aspect of the complaint because plaintiff was not qualified for the position, and, in any event, there is no evidence that the reasons given by defendant for its decision to hire Klampert were a pretext for illegal discrimination.

Citing the affidavit of Fern Schair, the former Executive Secretary and Chief Administrative Officer of the ABCNY, defendant claims that plaintiff was not qualified because

> (1) she did not possess a J.D.; (2) she did not have broad managerial experience; (3) she had had a difficult working relationship with her former supervisor, Frederick Baum, and with other employees; (4) she did not articulate a vision for the Library . . .; and (5) she used the opportunity of her interview to cast doubt on the qualifications of one of her colleagues . . . .

(Memorandum in Support of Defendant's Motion for Summary Judgment, dated

June 13, 2001, at 12). However, in order to be "qualified" within the meaning of the McDonnell Douglas test, an individual need not be the most desirable applicant for the position. "To satisfy the second element of the [McDonnell Douglas] test, [plaintiff] need not demonstrate that his performance was flawless or superior. Rather, he need only demonstrate that he 'possesses the basic skills necessary for performance of [the] job.'" De la Cruz v. New York City Human Res. Admin. Dep't of Soc. Servs., 82 F.3d 16, 20 (2d Cir. 1996), quoting Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978). The Second Circuit has defined "qualified" in terms of the "criteria the employer has specified for the position." Thornley v. Penton Publ'g. Inc., 104 F.3d 26, 29 (2d Cir. 1997). Thus, "the plaintiff's burden of alleging that he is qualified for the position is a minimal one . . . ." Mendelsohn v. University Hosp., 178 F. Supp.2d 323, 328 (E.D.N.Y. 2002). See also Slattery v. Swiss Reins. Am. Corp., supra, 248 F.3d at 92 ("[A]ll that is required is that the plaintiff establish basic eligibility for the position at issue, and not the greater showing that he satisfies the employer.").

In this case, the most objective statement of the qualifications for the position of Director of Library Services is that set forth in the newspaper advertisement run by defendant in 1997 (Schair Aff., Ex. 1), which is at odds with the reasons now put forth by defendant in support of its contention that plaintiff was not qualified. For example, although the ad states that a J.D. degree is "desirable," it does not state that it is required. Nor does the advertisement indicate that the ability to articulate a "vision" for the library is a qualification. Indeed, if plaintiff lacked the qualifications for the position of Director of Library Services, it is difficult to understand why defendant even interviewed plaintiff for the position. Accordingly, I conclude that, at the very least, there are questions of fact as to whether plaintiff was "qualified" for the position of Director of Library Services.

Defendant's second argument concerning plaintiff's failure to promote claim is more substantial. Defendant claims that its non-discriminatory reasons for hiring Klampert over plaintiff are that she was more qualified for the position:

> [T]he position (was offered] to Elizabeth Klampert in June 1997, in large part because she had both M.L.S. and J.D. degrees. Both of the previous directors . . . had held J.D. degrees as well. In

> addition, Ms. Klampert had been a practicing attorney before turning to library science, she had extensive managerial experience, she had held a comparable position at White & Case and she was able to articulate a vision of positive change for the Library -- modernization in terms of its collection and customer service -- that could be accomplished within the fiscal constraints that existed at that time.

(Schair Aff. ¶ 6).

Since defendant has articulated a non-discriminatory reason for the employment decision in issue, the burden now shifts to plaintiff to demonstrate that defendant's stated reasons for the employment decision were a pretext for illegal discrimination. Plaintiff, however, does not cite a shred of evidence in this regard.

First, plaintiff claims that a J.D. degree was not required for the job and cites her own Masters of Arts degree in linguistics. However, this argument in no way even tends to rebut defendant's argument that Klampert's J.D. degree made her a more desirable candidate for the position of Director of Library Services for a law library.

In further support of her claim of pretext, plaintiff argues that defendant installed Richard Tuske as Acting Director of Library Services prior to Klampert's hiring and claims that Tuske had only a high school diploma. Since Tuske had only a high-school diploma, plaintiff contends that defendant's reliance on Klampert's J.D. degree must be pretextual. Plaintiff's argument here misses the mark. The issue with respect to plaintiff's failure to promote claim is not whether plaintiff is a more qualified candidate than Tuske, but rather whether plaintiff has offered evidence sufficient to generate an issue of fact concerning the validity of the reasons given by defendant for its decision to hire Klampert. The fact that plaintiff had credentials superior to Tuske's does not even bear on whether plaintiff had credentials superior to Klampert's.

Plaintiff next cites the fact that an African-American female -- Evania Anne Thompson -- interviewed for the position of Director of Library Services and was denied the position, notwithstanding the fact that she has a M.L.S. degree

and is a member of the bar in both New York and New Jersey (Thompson Aff. ¶¶ 4-8, 16). Plaintiff appears to be arguing that defendant committed an act of illegal discrimination when it refused to hire Ms. Thompson and that this act of discrimination against Ms. Thompson evidences discriminatory animus against plaintiff. There are, however, several problems with this argument.

First, the Court of Appeals has recently emphasized that the central issue in any employment discrimination case is whether illegal discrimination played a role in the particular employment action being challenged by the plaintiff before the court; accordingly, evidence that an employer has acted properly towards other members of plaintiff's class does not establish an absence of discriminatory animus with respect to the plaintiff before the Court. Brown v. Henderson, supra, 257 F.3d at 252 "[D]iscrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex."). Logically, if evidence of the absence of discriminatory animus in connection with other employment decisions, by itself, cannot prove the absence of such animus in connection with an unrelated employment decision, it is difficult to understand how the possible presence of such animus on other occasions can, by itself, prove the presence of such animus in connection with an unrelated employment decision. In other words, it seems illogical that the probative value of putative similar act evidence could turn on whether the evidence inculpates or exculpates an employer.

Moreover, even if I assume that an act of discrimination by defendant against an African-American female is probative of defendant's alleged animus toward plaintiff, the evidence offered concerning Ms. Thompson does not even establish that Ms. Thompson was the victim of discrimination. All that is established by Ms. Thompson's affidavit is that she was qualified for the position of Director of Library Services, she applied for the position, was not offered the position and that the position was ultimately filled by a white female. Although this evidence is probably sufficient to establish a McDonnell Douglas prima facie case that defendant discriminated against Ms. Thompson, see Farias v. Instructional Sys., Inc., supra, 259 F.3d at 98, I do not believe that it is sufficient to create an issue of fact concerning defendant's decision not to promote plaintiff to Director of Library Services. The nature of the showing needed to establish a prima facie case of discrimination is "de minimis," Chambers v. TRM Copy Ctrs.

Corp., 43 F.3d 29, 37 (2d Cir. 1994), and, thus, the showing made with respect to Ms. Thompson cannot be accorded much weight. In addition, the weight to be accorded the evidence concerning Ms. Thompson is further attenuated by the fact that Ms. Thompson is African-American while plaintiff is Hispanic. Although it cannot rationally be denied that certain troglodytic segments of the population lamentably view the world as either white or non-white and, even more regrettably, discriminate on the basis of that perception, the undeniable difference between Ms. Thompson and plaintiff does raise an additional issue concerning the relevance of Ms. Thompson's case to plaintiff's.

Since plaintiff has offered no evidence sufficient to create an issue of fact concerning whether illegal discrimination played a role in the decision not to promote plaintiff to the position of Director of Library Services, I conclude that defendant is entitled to summary judgment on this aspect of plaintiff's claim.

b. Disparate Treatment

Plaintiff's allegation of disparate treatment has several facets. First, as an alleged result of defendant's discriminatory animus, plaintiff claims that she received smaller raises in 1997 and 1998 than three male counterparts -- Ronald Mirvis, Richard Tuske and Michael Leventhal. Second, plaintiff claims that after Klampert was hired, plaintiff's duties were diminished, constituting a constructive demotion. I shall address the two classes of claims separately.

i. Disparate Raises

Plaintiff alleges that, as part of a pattern of discrimination, in 1997 and 1998[4] Mirvis, Tuske and Leventhal received raises of approximately 100, while

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[4]Plaintiff's complaint alleges that the disparate raiseswere granted "[d]uring [the] salary review for 1998-99 . . . ("Statement/Affidavit" at ¶ 5). Since plaintiff was terminated in February 1999 and the defendant performs its annual reviews in April of each year (Klampert Aff. ¶ 17), I assume that plaintiff is complaining of raises that were actually awarded in 1997 and 1998. Defendant has interpreted the claim in this manner, and plaintiff does not argue in her opposition that defendant has misinterpreted her claim.

plaintiff received raises of approximately 3%, in each year.

Defendant first argues that this aspect of plaintiff's claim is time-barred. Plaintiff does not even address this aspect of defendant's motion.

Plaintiff filed her administrative complaint with the EEOC on July 31, 1999 (Ruiz-Valera Dep. at 103). Since an administrative charge of discrimination must be filed with the EEOC within 300 days of the conduct in issue, 42 U.S.C. § 2000e5(e)(1) and 29 U.S.C. § 626(d)(2), plaintiff is barred from asserting any conduct that occurred more than 300 days before July 31, 1999, i.e. claims based on conduct occurring before October 4, 1998 are time-barred. Since the last round of raises awarded to plaintiff and her comparators were awarded in April 1998 (Klampert Aff. ¶ 17), plaintiff's claim based on disparate raises is clearly time-barred.

Even if plaintiff's claim asserting disparate raises were not time-barred, defendant would still be entitled to summary judgment. Assuming that plaintiff has established a prima facie case of disparate treatment,[5] I conclude that she has failed to offer evidence to show that the disparate treatment was a pretext for illegal discrimination.

Plaintiff appears to be claiming that disparate treatment with respect to raises was the result of gender-based discrimination; the relevant paragraphs of plaintiff's statement pursuant to Local Civil Rule 56.1 allege gender discrimination only with respect to the raise (Plaintiff's Response to Statement of Material Facts ¶¶ 25-27). Defendant, however, has offered an affidavit setting forth the non-discriminatory reasons for the raises. Klampert states she

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[5]A plaintiff in a disparate treatment case ordinarily establishes the fourth element of a prima facie case -- evidence sufficient to support an inference of discrimination -- by showing that a similarly situated employee was treated differently. Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997). Defendant here claims that plaintiff and her comparators are not similarly situated and that plaintiff has not, therefore, established even a prima facie case. However, since the issue of "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury," Graham v. Long Island Rail Road, 230 F.3d 34, 39 (2d Cir. 2000), I shall assume that there is at least a question of fact in this regard and resolve the motion by addressing whether there is evidence that would sustain plaintiff's burden at the third step of the McDonnell Douglas analysis.

recommended Leventhal for a larger raise than plaintiff because his work had brought about substantial savings for the library, upgraded the library's technical capacity and because competition in the marketplace for individuals with Leventhal's skills was greater (Klampert Aff. ¶ 13). Klampert recommended Tuske for a larger raise because Tuske had been employed by defendant since 1970 (Deposition of Richard Tuske, conducted on November 29, 2000, annexed as Exhibibit 5 to the Declaration of Mark S. Filipini, dated June 13, 2001 ("Tuske Dep."), at 13), i.e. twelve years longer than plaintiff, he was helpfull to Klampert and willing to take on extra work (Klampert Aff. ¶ 14). Additionally, Klampert recommended Mirvis for a larger raise because he had both M.L.S. and J.D. degrees and his salary was below the market rate paid to individuals with comparable credentials (Klampert Aff. ¶ 15). The raises recommended for all three were approved by Barbara Opotowsky, the Executive Director of defendant (Klampert Aff. ¶¶ 13-15). The fact that all the raises were recommended and approved by women, is evidence that the raises were not the product of gender-based discrimination. Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1471 (11th Cir. 1991); Connell v. Consolidated Edison Co., 109 F. Supp.2d 202, 209 (S.D.N.Y. 2000); Zhang v. Barr Labs, Inc., 98 Civ. 5717 (DC), 2000 WL 565185 at *7 (S.D.N.Y. May 8, 2000); Starr v. Legal Aid Soc'y, 96 Civ. 6888 (JSR), 1998 WL 477733 at *3 (S.D.N.Y. Aug. 14, 1998).

Apart from repeating that "[g]ender bias [is] obvious" (Plaintiff's Response to Statement of Material Facts ¶¶ 25-27), plaintiff offers no evidence whatsoever to suggest that the reasons given by defendant are a pretext for illegal discrimination. Plaintiff testified at her deposition that she did not know why Mirvis got the raise he received (Ruiz-Valera Dep. at 98-99) and did not know whether the raises received by Tuske or Leventhal were related to their job functions (Ruiz-Valera Dep. at 105-06). Apart from the bare fact that her comparators are male and she is female, plaintiff offers nothing to show that genderbased discrimination played a role in determining the size of the raises awarded to plaintiff and her comparators.

I appreciate that most employers are sophisticated enough not to make flat-footed declarations of discriminatory animus, and, therefore, that a plaintiff alleging discrimination bears a difficult burden that is often difficult with. respect to proving discriminatory animus. Nevertheless, some evidence must be presented

from which the proscribed intent can be inferred for a plaintiff to get to trial. Here, plaintiff has shown nothing other than that males, who I assume to be similarly situated to plaintiff, received raises greater than hers. In light of defendant's sworn explanations for its actions and the fact that the decision makers were all female, the sparse nature of plaintiff's prima facie case requires that she come forward with some additional evidence from which discrimination can be inferred. See Schnabel v. Abramson, supra, 232 F.3d at 90. Since plaintiff has failed to offer any evidence in this regard, I conclude that summary judgment must be granted dismissing plaintiff's disparate treatment claim based on unequal raises.

ii. Constructive Demotion

The balance of plaintiff's disparate treatment claim is based on the reassignment of various duties from plaintiff to other employees after Klampert was hired. Plaintiff described these changes in her job as follows:

> I also suffered harm in that I was constructively demoted from my position. Younger personnel were introduced to begin taking over the duties of [the Technical Services Department] and reporting directly to the Director rather than to me as Head of the [Technical Services Department]. Although both Shirliene Bonilla and Jocelyn Rivera were working in my [Department] and I was expected to train them[,] they were reporting to the Director. Furthermore, she appointed the Director of Library Operations, Richard Tuske, and Michael Leventhal, the Head of the Technology Center, to be responsible for [the] physical and computer operations in the [Department] and I was asked to train them. These two white males lack formal education in bibliographic control (i.e. no Masters of Library Science degree). This partitioning was unnecessary since I had always been responsible for the physical conditions of the [Department] and was the System Administrator for the Online Public Access Catalog.

* * *

> [T]he functions in Technical Services are such an integral part of the library's operations that younger personnel were introduced immediately to begin replacing older, more experienced personnel. The Acquisitions Clerk, Joe Giesemann was replaced by Shirliene Bonilla in May of 1998, and Jocelyn Rivera was also introduced into my [Department] to handle mail and returns. My Administrative status was further diluted since I was expected to train them but they were reporting to the Director and I had not been consulted as to their placement in the [Department].

(Statement/Affidavit at ¶¶ 2, 5).

Defendant claims that it is entitled to summary judgment dismissing this aspect of plaintiff's claim because the transfers of which plaintiff complains do not constitute adverse employment actions and plaintiff cannot, therefore, establish a prima facie case. In the alternative, defendant argues that there is no evidence in the record to show that the non-discriminatory reasons given by defendant for the transfers constitute a pretext for illegal discrimination, i. e., plaintiff has not met the burden imposed at the third step of the McDonnell Douglas analysis.

Plaintiff's claim with respect to Bonilla arises out of the reassignment of certain functions from plaintiff's subordinate to Bonilla, who reported directly to Klampert. Until 1998, an individual named Joe Giesemann processed invoices for the Technical Services Department; he reported to plaintiff (RuizValera Dep. at 38-39, 41). Giesemann was fired in 1998 and his functions were transferred to Bonilla who processed invoices for the entire library and reported directly to Klampert (Ruiz-Valera Dep. at 37-39). Thus, the termination of Giesemann and the reassignment of his duties to Bonilla appears to have resulted in a diminution of plaintiff's supervisory functions.

Plaintiff's claim with respect to Rivera arises out of Rivera's being assigned to assist the Technical Services Department in 1998, on a part-time basis, with opening shipments of books and other mail, cancellations and as a microforms assistant (Ruiz-Valera Dep. at 42-43, 46). It appears that these were

also function previously performed by Giesemann. There is uncontradicted evidence in the record that Rivera was assigned to assist the Technical Services Department as a result of a request from plaintiff (Klampert Aff. ¶ 19).

Plaintiff also asserts that she was constructively demoted because (1) she was directed by Klampert to submit complaints or requests concerning environmental matters (i. e. replacement of burned-out light bulbs, requests that thermostats be adjusted, etc.) to Tuske, the Director of Library Operations (Ruiz-Valera Dep. at 64-66); (2) she was directed by Klampert to direct all communications to the "Help Desk" of a computer cataloging company through Leventhal, defendant's Technology Resource Manager (Ruiz-Valera Dep. at 75-77) and (3) Klampert directed Mirvis, the Head of the Reader Services Department to make recommendations concerning the retention or cancellation of certain subscriptions (Ruiz-Valera Dep. at 81-83; Klampert Aff. ¶ 22). Plaintiff conceded, however, that Mirvis's involvement in this activity did not displace plaintiff with respect to decisions concerning subscriptions (Ruiz-Valera Dep. at 83-84).

"An adverse employment action is a 'materially adverse change in the terms and conditions of employment.'" Weeks v. New York State, 273 F.3d 76, 85 (2d Cir. 2001), quoting Galabya v. New York City Bd. of Educ., supra, 202 F.3d at 640.

> It is well settled that a plaintiff may demonstrate an "adverse employment action" by showing a "materially adverse change in the terms and conditions of employment." Richardson v. New York State Department of Correctional Service, 180 F.3d 426, 446 (2d Cir. 1999) (quoting Torres, 116 F.3d at 640, cert. denied, 522 U.S. 997 (1997)). Although the contours of what comprises a materially adverse change in the terms and conditions of employment may be imprecise, courts have set forth the following list of factors to help determine whether an employment action is materially adverse: "[a] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might

be unique to a particular situation." Davis v. City University of New York, 1996 WL 243256 at *8 (S.D.N.Y. 1996)(quoting Monica v. New York City Off-Track Betting Corp., 1995 WL 117879 at *4 (S.D.N.Y. 1995); See also De la Cruz v. New York City Human Resources Admin. Dep't of Soc. Serv., 82 F.3d 16, 21 (2d Cir. 1996) (stating that a materially adverse change is not limited to "pecuniary emoluments," but may include diminution of duties motivated by discrimination)(quoting Rodriguez v. Board of Educ., 620 F.2d 362, 366 (2d Cir. 1980).

It is clear that "[a] materially adverse change is one that 'has an attendant negative result, a deprivation of a position or an opportunity.'" Davis, 1996 WL 243256 at *8 (citations omitted). However, not every unpleasant matter creates a cause of action, including insubstantial changes in an employee's work conditions. Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997)(quoting Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994)). Thus, the change must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Davis, 1996 WL 243256 at *8 (quoting Monica, 1995 WL 117879 at *4). "'Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of "adverse"'" Wanamaker, 108 F.3d at 466 (quoting Welsh, 14 F.3d at 86).

Fridia v. Henderson, 99 Civ. 10749 (BSJ), 2000 WL 1772779 at *6-*7 (S.D.N.Y. Nov. 30, 2000) (no adverse employment action found where plaintiff complained of an excessive workload and was denied requests for leave with pay). See also Bennett v. Watson Wyatt & Co., supra, 136 F. Supp.2d at 246-47.

In Rodriguez v. Board of Educ., 620 F.2d 362, 366 (2d Cir. 1980), the Second Circuit found an adverse employment action where an art teacher's responsibilities upon being transferred were "so profoundly different from those [in her previous job] as to render utterly useless her twenty years of experience . . ." Rodriguez characterized adverse employment actions as "radical change[s]

in the nature of the work" and "severe professional . . . trauma[s]" 620 F.2d at 366. However, in Galabya v. New York City Bd. of Educ., supra, 202 F.3d at 641, the Court of Appeals found no adverse employment action where a transferred teacher "ha[d] not produced evidence to show that the transfer was to an assignment that was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement." A "dramatic downward shift in [the] skill level required to perform job responsibilities" can constitute an adverse employment action. Dahm v. Flynn, 60 F.3d 253, 257 (7th Cir. 1994). The test is an objective one and does not turn on plaintiff's subjective perception. Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996).

Judged by the foregoing standards, the re-assignments of functions cited by plaintiff are not sufficiently serious to constitute an adverse employment action. Although it appears that plaintiff lost supervisory authority over one subordinate (Giesemann), there is no evidence that she was stripped of all of her subordinates. To the contrary, as of her termination in February, three individuals were employed by the Technical Services Department and reported to plaintiff (Ruiz-Valera Dep. at 88-89; Statement/Affidavit at ¶ 6). Thus, the managerial nature of plaintiff's job did not change substantially. Moreover, the reorganization of duties and lines of reporting cited by plaintiff was nothing more than a garden-variety modification of job functions which occurs in any job. Even viewing all the changes in her job function collectively, they simply do not constitute a significant diminution of plaintiff's job functions.

Moreover, even if I assume that the modifications of duties cited by plaintiff amount to an adverse employment decision, plaintiff has not cited any evidence to rebut the legitimate non-discriminatory reasons offered by defendant. Defendant claims that Giesemann was terminated and all billing functions reassigned to Bonilla in an effort to consolidate billing operations (Klampert Aff. ¶ 18) and that Rivera was assigned duties formerly handled by the Technical Services Department in response to a request for assistance from plaintiff (Klampert Aff. ¶ 19). Klampert's directive that environmental matters be reported through Tuske was imposed on all departmental heads and was not aimed uniquely at plaintiff (Klampert Aff. ¶ 20). Klampert's instruction that calls to the computer cataloging company's "Help Desk" be routed through Leventhal was prompted by his "superior computer knowledge" and the fact that such

responsibility was most consistent with his job– Technology Resource Manager (Klampert Aff. ¶ 21). Finally, Mirvis.did not supplant plaintiff from the performance of any duties (Klampert Aff. ¶ 22).

In effect, all plaintiff has offered is that she was a member of a protected class, she was qualified, some of her duties were reassigned and that some of her lines of reporting were changed. Plaintiff cites no evidence that rebuts the non-discriminatory reasons offered by defendant in its motion papers. Assuming that plaintiff's allegations meet the minimal burden of a prima facie case, their minimal nature, in conjunction with the non-discriminatory reasons proffered in defendant's affidavits, require that plaintiff come forward with some additional evidence to show that illegal discrimination was a motivating factor in the employment decisions in issue.

Accordingly, I conclude that summary judgment in favor of defendant should also be granted dismissing that aspect of plaintiff's complaint alleging constructive demotion.

4. Discriminatory Termination

Defendant next seeks summary judgment dismissing plaintiff's discriminatory discharge claim, arguing again that plaintiff has failed to establish a prima facie case. Alternatively, defendant argues that even if plaintiff has established a prima facie case, plaintiff has failed to cite any evidence that the non-discriminatory reason given for the elimination of plaintiff's department -- cost cutting -- was a pretext for illegal discrimination.

At the time of plaintiff's termination, the Technical Services Department employed four individuals -- plaintiff, Nita Florentino, Merelene Jackson and Gloria Swanson. All are female, and all were over 40 at the date of their termination. Plaintiff is Hispanic, Florentino is Asian, Jackson is African-American and Swanson is white. All were terminated when the Technical Services Department was eliminated, except for Swanson (Statement/Affidavit at ¶ 6). According to defendant, Swanson, who was over seventy years of age in February 1999, was paid approximately $6,600 per year (she worked only ten hours per week) and the cost of retaining her did not materially affect the cost of the department (Klampert Aff. ¶ 9 & Ex. 1). In addition, defendant justifies

Swanson's retention because she had worked at defendant's library for fifty years and had irreplaceable knowledge concerning how and why materials were acquired, cataloged and stored (Klampert Aff. ¶ 9). In contrast, the aggregate annual cost of the three positions that were terminated was approximately $150,000, or $12,500 per month, including fringe benefits (Klampert Aff., Ex. 1).

In support of its motion, defendant has submitted a July 1998 estimate of the cost of using an outside cataloging service to perform the functions performed by the Technical Services Department. The estimated monthly cost of cataloging new materials is $6,000 per month. If the cost of retrospectively cataloging the library's existing collection is added, the aggregate cost is $11,000 per month (Klampert Aff., Ex. 2).

Assuming without deciding that defendant's retention of Swanson -- a white female -- is sufficient to satisfy plaintiff's minimal burden of establishing a prima facie case of race discrimination, plaintiff has again failed to offer evidence sufficient to rebut defendant's proffered financial justification for eliminating plaintiff's department. Indeed, except to note that the outside catalog retained by defendant was "expensive," (Plaintiff's Response to Statement of Material Facts at ¶ 36), plaintiff makes no attempt to rebut the cost justification proffered by defendant for its actions. Plaintiff does not point to any inconsistencies in the reasons offered by defendant for terminating her, see generally Carlton v. Mystic Transp., Inc., supra, 202 F.3d at 136-37, nor does she offer any evidence that positions in the department actually remained open after her termination. See generally Tarshis v. Riese Org., supra, 211 F.3d at 37. Since plaintiff has failed to meet her burden of producing "sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not [illegal discrimination] was the real reason for the discharge," summary judgment dismissing plaintiff's discriminatory discharge claim is also appropriate. Woroski v. Nashua Corp., supra, 31 F.3d at 110; accord Viola v. Philips Med. Sys., 42 F.3d 712, 717 (2d Cir. 1994).

5. Retaliatory Termination

Finally, defendant claims it is entitled to summary judgment on that aspect

of plaintiff's complaint that alleges she was terminated in retaliation for her complaints to Hsu-Luk that she was being subjected to a hostile work environment.

Title VII and the ADEA both prohibit an employer from discriminating against an employee who, among other things, opposes or makes a charge protesting a practice prohibited by either statute. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d).

Claims alleging retaliation, like claims of direct discrimination, are also analyzed under the familiar framework o McDonnell Douglas v. Green, supra, 411 U.S. 792 (1973).

> We analyze a claim of retaliatory discharge under the familiar three-part burden shifting analysis that was also first set forth in McDonnell Douglas, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; see Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995), abrogated on other grounds by Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). In order to make out a prima facie case of retaliation, a plaintiff must show by a preponderance of the evidence "[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." Holt v. KMI-Continental, Inc., 95 F.3d 123, 130 (2d Cir. 1996)] (internal quotation marks omitted). Moreover, "the burden that must be met by an employment discrimination plaintiff to survive a summary judgment motion at the prima facie, stage is de minim[i]s." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994) (alterations in original) (internal quotation marks omitted). Once the plaintiff has established a prima facie case, defendant must proffer a legitimate, nondiscriminatory reason for the adverse action. If it does so, then the burden shifts back to the plaintiff to demonstrate pretext. See Tomka, 66 F.3d at 1308.

Slattery v. Swiss Reins. Am. Corp., supra, 248 F.3d at 94-95. See also Holtz v. Rockefeller & Co., 258 F.3d 62, 79-82 (2d Cir. 2001); Cifra v. General Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001); Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997); Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 292 (2d Cir. 1998); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714 (2d Cir. 1996); Cobian v. New York City, 99 Civ. 10533 (KMW)(AJP), 2000 WL 1782744 at *16 (S.D.N.Y. Dec. 6, 2000), aff'd without opinion, 2002 WL 4592 (2d Cir. Dec. 21, 2001).

Defendant claims that it is entitled to summary judgment because plaintiff cannot establish that she engaged in protected activity and cannot, therefore, establish a prima facie case. Alternatively, defendant argues that even if there is sufficient evidence to establish a prima facie case, plaintiff has not rebutted defendant's legitimate, non-discriminatory reason for plaintiff's termination.

"The term 'protected activity' refers to action taken to protest or oppose statutorily prohibited discrimination." Cruz v. Coach Stores, Inc., supra, 202 F.3d at 566. In this regard,

> [t]he law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, "including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges."

Matima v. Celli, 228 F.3d 68, 78-79 (2d Cir. 2000), quoting Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

Plaintiff's complaints to Hsu-Luk do not constitute protected activity and could not be reasonably believed to constitute protected activity. As set forth at page 6-8 above, plaintiff's complaints to Hsu-Luk related to Klampert's management style and her reorganization of the library. According to plaintiff's own testimony, she made no complaint to Hsu-Luk that either she or anyone else employed by defendant was being subjected to discrimination on the basis of race, gender or age. Thus, plaintiff has failed to establish a prima facie case.

Moreover, even if plaintiff had established a prima faciecase, defendant would still be entitled to summary judgment because plaintiff has failed to come forward with sufficient evidence to create an issue of fact concerning the non-discriminatory reasons proffered by defendant for plaintiff's discharge. As discussed at page 44-46, above, plaintiff has simply offered no evidence that defendant's financial justification for the elimination of plaintiff's department was pretextual.

Finally, I note that since defendant's summary judgment motion was submitted, the Supreme Court decided Clark County School Dist. v. Breeden, supra, 532 U.S. 268 (2001) (per curiam) which held that where an employer contemplated an adverse employment action for a non-discriminatory reason and the subject of the contemplated action subsequently engages in protected activity, the employer's execution of the contemplated adverse action subsequent to the protected activity does not give rise to any inference that the protected activity caused the adverse action. In this case, there is uncontradicted evidence that the decision to eliminate the Technical Services Department was made in December 1998, one month prior to plaintiff's complaints to HsuLuk (Klampert Aff. ¶ 7). Breeden teaches that the fact that the adverse employment decision had not only been contemplated, but actually made, before the plaintiff's allegedly protected activity precludes any retaliation claim. 532 U.S. at 272.

IV. Conclusion

Understandably, the termination of any employment relationship of seventeen years' duration is a wrenching and unpleasant experience. However, for the reasons set forth above, plaintiff has failed to meet her burden of producing sufficient evidence to create a genuine issue of fact that illegal discrimination was a motivating factor in either the terms and conditions of her employment or for her termination. Accordingly, I respectfully recommend that summary judgement be granted for defendant.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules

of Civil Procedure, the parties shall have ten (10) days from the date of this Report to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, 500 Pearl Street, Room 1610, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Wood. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.1992); Wesolek v. Canadair Ltd.,838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
February 27, 2002

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

(2)

No. 03-1534

IN THE

Supreme Court of the United States

PHOEBE RUIZ-VALERA,

Petitioner,

VS.

ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF AND APPENDIX FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether an inference of non-discrimination is proper under Title VII based on the fact that the decision makers who themselves are members of a protected class make adverse employment decisions against employees who belong to the same protected class as that of the decision makers.

2. Whether in view of the conflicts in the circuits in interpreting case law as to what constitutes "materially adverse changes" in working conditions, there is need for an objective definitive standard on this issue to screen such claims for materiality.

Pursuant to Rule 15-8 of the Rules of the Supreme Court of the United States, Petitioner Phoebe Ruiz-Valera submits this brief and important unpublished opinion.

THE 2002 UNPUBLISHED OPINION OF THE THIRD CIRCUIT COURT OF APPEALS IS ANOTHER EXAMPLE OF THE SPLIT IN THE CIRCUITS AND CONFUSION IN THE APPLICATION OF *ONCALE*[1] REGARDING DISCRIMINATION BY DECISION MAKERS WHO ARE MEMBERS OF THE SAME PROTECTED CLASS AS PLAINTIFFS.

In *Elwell v. PP&L, INC.*, the attached unpublished opinion, No. 01-4512, filed September 30, 2002, the Third Circuit Court of Appeals in dismissing Elwell's age discrimination claim opined "that Elwell's case is further weakened by the fact Sobeck [the decision maker] was fifty years old at the time he made his hiring choice." In support of this opinion, the Court in conflict with other circuits set forth in the petition relied *Dungee v. Northeast Foods, Inc.*940 F. Supp. 682,688 n.3(D.N.J. 1996) (citing cases that hold a plaintiff's ability to raise an inference of discrimination is hampered when the decision maker is a member of plaintiff's protected class." Appendix 11a.

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[1] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

CONCLUSION

In view of the split in the conflicts and confusion regarding the two questions presented here, the petition for a writ of certiorari should be granted .

Respectfully submitted,

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APPENDIX

APPENDIX - UNPUBLISHED THIRD CIRCUIT COURT OF APPEALS OPINION FILED SEPTEMBER 30, 2002

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4512

EDWARD ELWELL
Appellant

V.

PP & L, INC.
Appellee

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(99-CV-2716)
District Judge: The Honorable Franklin S. Van Antwerpen

Submitted Pursuant to Third Circuit L.A.R. 34.1 (a)
September 13, 2002

Before: ALITO, FUENTES and OBERDORFER*,
Circuit Judges

(Opinion Filed: SEP 30 2002)

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* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge.

Plaintiff Edward Elwell appeals the District Court's grant of the motion for reconsideration of its motion for summary judgment brought by his employer, Defendant PP & L, Inc., and the denial of his motion for reconsideration of his motion for summary judgment. Because we agree with the District Court that Plaintiff failed to raise a genuine issue of material fact with respect to his age discrimination claims, we affirm.

I. Facts and Procedural Background

The factual allegations underlying this case are well known to the parties, and therefore, they are not detailed here, except to the extent that they directly bear upon the analysis. Elwell asserted age discrimination and retaliation claims against the Defendant pursuant to the Age Discrimination and Employment Act, 29 U.S.C. § 621 et seq. (ADEA) and the Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, § 955(a). In his Complaint, Elwell alleged that, beginning in 1995, when his position of Area Operations Manager was eliminated, and continuing until the filing of his Complaint, the Defendant subjected him to an ongoing pattern of discriminatory decision-making by demoting him and subsequently failing to hire and/ or promote him to positions for which he was qualified. Elwell alleged that, as a result, his salary was reduced and was susceptible to further reduction. Additionally, Elwell asserted that he suffered adverse employment actions in retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Defendant moved for summary judgment as to all counts of Elwell's complaint.

Initially, the District Court denied Defendant's motion for summary judgment. Subsequently, Defendant filed a motion for

reconsideration of its motion for summary judgment, which the District Court granted in part and denied in part. The court ruled that only the last three positions for which Elwell applied could be considered. These positions were the Power Delivery Regional Work Manager, Supervising Engineer, and the Service Order Fulfillment (SOF) Team Leader positions. The court held that Elwell failed to establish a prima facie claim as to the Power Delivery Regional Work Manager position because the candidate selected for this position was but one year younger than Elwell. As to the Supervising Engineer and SOF Team Leader positions, the court held that Elwell did not present evidence which successfully rebutted the nondiscriminatory reasons advanced by the Defendant for the selection of other candidates for these positions. Because it held that Elwell failed to establish that any acts of discrimination occurred within the 300 day time window preceding his filing of a charge of discrimination with the EEOC, the court ruled that Elwell's claims arising out of employment decisions made prior to the 300 day period could not be brought under a continuing violations theory and were therefore timebarred. The court rejected Elwell's claim of retaliation based on his employer's failure to hire him for a Project Manager position, ruling that Elwell presented a triable issue only as to whether he had received a less favorable evaluation due to his filing an EEOC charge.

Thereafter, Elwell filed a motion for reconsideration, which the court denied in its entirety. In doing so, the court reversed its earlier holding that Elwell's claim of discrimination arising out of Defendant's failure to hire him for the Audit Team Leader position was untimely. The court held that Elwell's claim pertaining to this position was timely because a "mailbox rule" applied, and therefore the date that the charge was received by the EEOC was not determinative. The court nevertheless dismissed Elwell's claim on the basis that Elwell failed to show that he was qualified for the Audit Team Leader position and, therefore, failed to establish a prima facie case of age discrimination arising out the selection of another candidate for

the position. The court further held that, even if Elwell established a prima facie case, no reasonable finder of fact could find that he was denied the position based on age discrimination.

The court also revisited Elwell's claim of age discrimination with respect to Defendant's decision not to hire him for the Power Delivery Regional Work Manager position. The court held that, even assuming that Elwell could make out a prima facie case, i.e., even though the candidate chosen for the job was merely one year younger than him, he did not present evidence from which a reasonable trier of fact could conclude that age discrimination motivated the hiring decision. The court declined to revisit its holding with respect to the Supervising Engineer position. After revisiting its analysis of why Elwell failed to establish a triable issue arising out of another candidate's selection for the SOF Team Leader position, the District Court reiterated its previous ruling dismissing this claim.

After a bench trial on Elwell's retaliation claim which survived summary judgment, Judge Rueter entered judgment in favor of Defendant. Elwell does not challenge this judgment on appeal. Elwell appeals the District Court's rulings that he could not sustain his age discrimination claims on the merits with respect to three of the positions for which he applied and was rejected, namely the Audit Team Leader, Supervising Engineer, and SOF Team Leader positions.

II. Jurisdiction and Standard of Review

The District Court exercised jurisdiction over this matter under 28 U.S.C. § 1331 and pendent jurisdiction over Appellant's state law claims pursuant to 28 U.S.C. § 1367. We have appellate jurisdiction under 28 U.S.C. § 1291.

"[T]he standard of review for a denial of a motion for reconsideration varies with the nature of the underlying judicial decision." Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345,

348 (3d Cir. 1986). Because this court is addressing the District Court's rulings on Defendant's motion for summary judgment, this Court has plenary review. See id. at 349.

III. Discussion

Elwell asserts that the District Court erred in holding that he did not establish a prima facie case with respect to the Audit Team Leader position and in holding that, even assuming that he did, he failed to rebut the nondiscriminatory reasons advanced by Defendant with regard to its hiring decision for this position as well as the Supervising Engineer and SOF Team Leader positions. Elwell asserts that the District Court usurped the role of the jury by improperly making credibility determinations regarding the age discrimination evidence submitted by the parties. In response, Defendant asserts that, because Appellant failed to present evidence in support of his age discrimination claims, the judgment of the District Court should not be disturbed and this appeal should be denied.

The parties essentially agree as to the controlling legal standards. In order to establish a prima facie ADEA case, a plaintiff must show that "(1) he is over 40, (2) he is qualified for the position in question, (3) he suffered an adverse employment decision, and (4) he was replaced by a sufficiently younger person to create an inference of age discrimination." Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995). If the plaintiff is able to establish a prima facie case, a presumption of age discrimination arises, which the employer must rebut by providing a legitimate non-discriminatory reason for the adverse employment action. See id. "To defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." Id.

A. Audit Team Leader

The District Court held that, even assuming Elwell could establish a prima facie case of age discrimination arising out of the selection of a younger candidate for the Audit Team Leader position, this claim necessarily failed because Elwell did not present evidence which would lead a reasonable jury to conclude that the reasons advanced by the Defendant were pretextual. Elwell asserts that, in arriving at its conclusion, the District Court improperly weighed the evidence by reasoning that Defendant's "subjective evidence" was more worthy of credence than the "objective evidence" he introduced. Appellant's Br. at 11.

In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the Supreme Court held that a juror could "infer the ultimate fact of discrimination from the falsity of the employer's explanation" absent the introduction of "additional, independent evidence of discrimination." Reeves, 503 U.S. at 147-49. The Court explained that:

> [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record

> conclusively revealed some other nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (emphasis in original). This is consistent with our earlier holding in Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994), where we explained that:

> because the factfinder may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered non-discriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons, a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. Thus, if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.

Fuentes, 32 F.3d at 764 (emphasis in original) (citations omitted). Defendant came forward with the deposition testimony of Martin Urban, who was one of three employees of the Defendant who interviewed Elwell for the Audit Team Leader position in

February of 1997 and was the person who made the decision to not hire Elwell. Urban testified that he decided that Elwell was not the best candidate for the Audit Team Leader position because a score of 3.0 was required for the position and he had interviewed him for a position entailing similar responsibilities in a different area of the company in August of 1996, at which time Elwell received a consensus score of 2.43 from the three interviewers. In order to show that this reason was but a pretext for discrimination, Elwell came forward with a "Synchrony Feedback" evaluation of Elwell from August of 1996, in which he received a score of 4.2 for his performance on his then current job. The District Court correctly reasoned that, because there was no evidence (1) that either Elwell's score of 2.43 in the earlier interview for the similar position or the requirement of a score of 3.0 were incorrect; or (2) that the level of proficiency required to score 4.2 on the Synchrony Feedback evaluation was sufficient to qualify for the Audit Team Leader position; or (3) that Elwell's qualifications for his then current job implied he was sufficiently qualified for a higher level position, a reasonable jury could neither discredit Defendant's reasons as pretextual nor find that age discrimination was more likely than not a determinative factor in Defendant's decision not to promote Elwell.

The District Court properly rejected Elwell's argument that it usurped the role of the jury by weighing the Synchrony Evaluation against the consensus score. As the District Court explained,

> [c]redibility determinations are indeed the province of the trier of fact. On a motion for summary judgment, the court must accept as true all reasonable inference that favor the nonmoving party. However, we may only consider <u>reasonable</u> inferences; we may not improperly consider those inferences that are unreasonable. We have drawn all reasonable

inferences in favor of Plaintiff.

> It remains our function, however, to determine whether there is sufficient evidence for a claim to reach the trier of fact.

App. at 60-61 (citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure§ 2528 (2d ed. 1995), at 294) (emphasis in original). Accordingly, we affirm the District Court's dismissal of Elwell's claim for age discrimination arising out of the selection of a younger candidate for the Audit Team Leader position.

B. Supervising Engineer

Similarly, Elwell's claim of discrimination arising out of Defendant's choice of another candidate for the Supervising Engineer position, which Elwell applied for and was rejected from without having the opportunity to interview, fails due to his failure to rebut the reasons advanced by the Defendant for its hiring choice. Elwell asserted that Douglas Krall, the PP & L employee with hiring authority with respect to this position, could not have known that he lacked the skills the position required because he was never given the opportunity to present his qualifications at an interview. Moreover, Elwell asserts that the job posting for which he tailored the materials he submitted did not indicate that the position required "technical knowledge of energy scheduling and reconciliation, the tariff structure within the Pennsylvania, New Jersey and Maryland (PJM) power grid, factors that lead to power flow disruptions, and coordination and drafting of contracts with alternative electric suppliers." App. at 232, Krall Decl.

The District Court properly rejected this argument on the basis that Elwell failed to introduce evidence that age discrimination more likely motivated the hiring choice and failed to demonstrate "such weaknesses, implausibilities,

inconsistences, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence[.]'" Fuentes, 32 F.3d at 765 (emphasis in original) (citations omitted). Because Elwell did not show that the reasons advanced for the hiring of a candidate possessing the skills sought were a pretext for age discrimination, he failed to carry his burden under the McDonnell Douglas framework and dismissal of his claim regarding the Supervising Engineer position was appropriate.

C. SOF Team Leader Position

Finally, the Court addresses Elwell's contention that the District Court erred in dismissing his claim of age discrimination arising out of his nonselection for the SOF Team Leader position. Assuming, without deciding, that nonselection for this project leadership role amounted to an "adverse employment action," Elwell's claim fails as it boils down to his assertion that the candidate selected proved to be a disappointing choice and that he could have done a better job. Michael Sobeck, Defendant's employee who made the hiring decision with respect to this position, asserted that he did not choose Elwell for the job because his staff recommended against his selection due to a lack of confidence in Elwell's leadership and management skills and because Elwell had expressed doubts about the team's ability to complete the project. While Elwell asserted that he was the logical choice for the position, he did not present evidence from which a reasonable jury could find that he was discriminated against because of his age. We observe that Elwell's case is further weakened by the fact that Sobeck was fifty years old at the time he made his hiring choice. See App. at 207; Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 688 n. 3 (D. N.J. 1996) (citing cases that hold that a plaintiff's ability to raise an inference of discrimination is hampered when the decision maker is a member of the plaintiff's protected class).

IV. Conclusion

After carefully considering the arguments discussed above and all other arguments advanced by the Appellant in support of his assertion that the District Court erred in dismissing his claims on summary judgment, we affirm the District Court's decision.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

By the Court,

_____

Circuit Judge